DOCKET

No. 08-861

Title: Free Enterprise Fund and Beckstead and Watts, LLP, Petitioners
v.
Public Company Accounting Oversight Board, et al.

Docketed: January 8, 2009

Lower Ct: United States Court of Appeals for the District of Columbia Circuit

Case Nos.: (07-5127)

Decision Date: August 22, 2008

Rehearing Denied: November 17, 2008

Questions Presented

Date	Proceedings and Orders
Jan 5 2009	Petition for a writ of certiorari filed. (Response due February 9, 2009)
Feb 4 2009	Order extending time to file response to petition to and including March 11, 2009, for all respondents.
Feb 9 2009	Brief amicus curiae of American Civil Rights Union filed.
Feb 9 2009	Brief amicus curiae of Mountain States Legal Foundation filed.
Feb 9 2009	Brief amicus curiae of Washington Legal Foundation filed.
Feb 27 2009	Order further extending time to file response to petition to and including April 10, 2009, for all respondents.
Apr 10 2009	Brief of respondent United States in opposition filed.
Apr 10 2009	Brief of respondents Public Company Accounting Oversight Board, et al. in opposition filed.
Apr 21 2009	DISTRIBUTED for Conference of May 14, 2009.
Apr 22 2009	Reply of petitioners Free Enterprise Fund, and Beckstead and Watts, LLP filed. (Distributed)
May 18 2009	Petition GRANTED.
Jun 3 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including July 27, 2009.
Jul 23 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the Federal Respondent.
Jul 27 2009	Joint appendix filed (statment of costs received).
Jul 27 2009	Brief of petitioners Free Enterprise Fund and Beckstead and Watts, LLP filed.
Jul 31 2009	Brief amicus curiae of Center for Individual Rights filed.
Aug 3 2009	Brief amici curiae of Law Professors, Steven Calabresi, et al. filed.
Aug 3 2009	Brief amicus curiae of The Claremont Institute Center for Constitutional Jurisprudence filed.
Aug 3 2009	Brief amici curiae of American Civil Rights Union, et al. filed.
Aug 3 2009	Brief amici curiae of Cato Institute, et al. filed.
Aug 3 2009	Brief amici curiae of William P. Barr, et al. filed.
Aug 3 2009	Brief amicus curiae of Mountain States Legal Foundation filed.
Aug 3 2009	Brief amicus curiae of Coalition for Fair Lumber Imports filed.
Aug 3 2009	Brief amici curiae of Law Professors, Stephen Bainbridge, et al filed.
Aug 4 2009	The time within which to file respondents' briefs on the merits is extended to and

	including September 29, 2009.
Sep 28 2009	SET FOR ARGUMENT ON Monday, December 7, 2009.
Sep 28 2009	The time within which to file respondents' briefs on the merits is further extended to and including October 13, 2009.
Sep 29 2009	CIRCULATED
Oct 13 2009	Brief of respondent United States filed. (Distributed).
Oct 13 2009	Brief of respondents Public Company Accounting Oversight Board, et al. filed. (Distributed)
Oct 15 2009	Record received from U.S.C.A. for the D.C. Circuit. (1 box)
Oct 16 2009	Application (09A354) to extend the time to file a reply brief on the merits from November 12, 2009 to November 25, 2009, submitted to The Chief Justice.
Oct 19 2009	Application (09A354) granted by The Chief Justice for an extension of time within which to file petitioner's reply brief on the merits to and including November 23, 2009.
Oct 19 2009	Brief amici curiae of Council of Institutional Investors, et al. filed. (Distributed).
Oct 20 2009	Motion for divided argument filed by respondent United States.
Oct 20 2009	Brief amici curiae of Former Chairmen of the Securities and Exchange Commission filed. (Distributed)
Oct 20 2009	Record received from the U.S.D.C. for the District of Columbia Circuit. (1 envelope)
Oct 20 2009	Brief amicus curiae of Center for Audit Quality filed. (Distributed)
Oct 20 2009	Brief amicus curiae of National Association of State Boards of Accountancy filed. (Distributed).
Oct 20 2009	Brief amici curiae of Constitutional and Administrative Law Scholars filed. (Distributed)
Nov 2 2009	Motion of the Solicitor General for divided argument GRANTED.
Nov 23 2009	Reply of petitioners Free Enterprise Fund, and Beckstead and Watts, LLP filed. (Distributed)
Dec 7 2009	Argued. For petitioners: Michael A. Carvin, Washington, D.C. For respondent United States: Elena Kagan, Solicitor General, Department of Justice, Washington, D.C. For respondents Public Company Accounting Oversight Board, et al.: Jeffrey A. Lamken, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

No. 08-

IN THE
Supreme Court of the United States

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,

Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sarbanes-Oxley Act of 2002 violates the Constitution's separation of powers by vesting members of the Public Company Accounting Oversight Board ("PCAOB") with far-reaching executive power while completely stripping the President of all authority to appoint or remove those members or otherwise supervise or control their exercise of that power, or whether, as the court of appeals held, the Act is constitutional because Congress can restrict the President's removal authority in any way it "deems best for the public interest."

2. Whether the court of appeals erred in holding that, under the Appointments Clause, PCAOB members are "inferior officers" directed and supervised by the Securities and Exchange Commission ("SEC"), where the SEC lacks any authority to supervise those members personally, to remove the members for any policy-related reason or to influence the members' key investigative functions, merely because the SEC may review some of the members' work product.

3. If PCAOB members are inferior officers, whether the Act's provision for their appointment by the SEC violates the Appointments Clause either because the SEC is not a "Department" under *Freytag v. Commissioner*, 501 U.S. 868 (1991), or because the five commissioners, acting collectively, are not the "Head" of the SEC.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding below are identified in the caption of the case.

Petitioner Free Enterprise Fund has no parent corporation and no publicly held corporation has a 10% or greater ownership interest in Free Enterprise Fund.

Petitioner Beckstead and Watts, LLP, has no parent corporation and no publicly held corporation has a 10% or greater ownership interest in Beckstead and Watts, LLP.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-104a) is reported at 537 F.3d 667. An order denying rehearing and rehearing *en banc* (Pet. App. 1a) is unreported. The district court's memorandum and order granting Respondents' motions for summary judgment (Pet. App. 105a-117a) are unreported but available electronically at 2007 WL 891675.

JURISDICTION

Petitioners seek review of a final decision of the court of appeals entered on August 22, 2008. Rehearing and rehearing *en banc* were denied on November 17, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. §§ 7201 *et seq.*), reprinted at Pet. App. 118a-182a, and the Appointments Clause of the Constitution (Pet. App. 183a).

STATEMENT OF THE CASE

Petitioners seek review of the D.C. Circuit's decision rejecting their contention that, by stripping the President of all power to appoint, remove or otherwise supervise the members of the Public Company Accounting Oversight Board ("PCAOB" or "Board"), the Sarbanes-Oxley Act ("SOX" or "Act")

violates the Constitution's separation of powers and Appointments Clause.

1. Congress passed the Act in reaction to high-profile accounting scandals involving Enron and other companies. Pet. App. 6a. The Act subjects accounting firms that audit public companies to the broad regulatory authority of the PCAOB, a new organization specifically designed to be free from any and all political influence—including that of both the President and the already independent SEC. Pet. App. 34a.

The Act gives the PCAOB, a putatively private corporation, *see* SOX § 101(b), 15 U.S.C. § 7211(b), "massive power, unchecked power, by design," 148 Cong. Rec. S6327-06, S6334 (daily ed. July 8, 2002) (statement of Sen. Gramm). The Board exercises its authority through five members who serve for staggered five-year terms. SOX § 101(e), 15 U.S.C. § 7211(e). These members are neither appointed nor removable by the President, but instead are appointed and removable by a majority vote of the SEC. SOX § 101(e)(4), (6), 15 U.S.C. §§ 7211(e)(4), (6).

The Act permanently vests the PCAOB with broad regulatory and enforcement authority over all accounting firms that audit publicly traded companies. Among other things, the Act authorizes the Board:

- to promulgate rules, including professional standards, "as may be necessary or appropriate in the public interest or for the

protection of investors," SOX § 103(a)(1), 15 U.S.C. § 7213(a)(1), the willful violation of which constitutes a felony criminal offense, *see* 15 U.S.C. § 78ff(a) (made applicable by SOX § 3(b), 15 U.S.C. § 7202(b));

- to conduct a "continuing program of inspections" that involves the selective inspection and review of an accounting firm's audit engagements, SOX § 104(a), 15 U.S.C. § 7214(a);
- to conduct a formal investigation of any act by a regulated accounting firm that "may violate" the Act, Board rules, securities laws or professional standards, SOX § 105(b)(1), 15 U.S.C. § 7215(b)(1), and impose severe sanctions for violations "as it determines appropriate," *id.* § 105(c)(4), 15 U.S.C. § 7215(c)(4); and
- to sets its own budget, funded through a tax that it levies on publicly traded companies, SOX § 109(b)-(d), 15 U.S.C. § 7219(b)-(d).

The Act gives the President absolutely no oversight over PCAOB activities, through the power of removal or otherwise. The Act also imposes numerous constraints on the independent SEC's ability to exercise any meaningful oversight. Thus:

- the Act allows the SEC to remove a Board member only after notice and a hearing, and then only if the member (i) "has willfully violated" any provision of the Act, the rules

of the Board or the securities laws, (ii) "has willfully abused [his] authority," or (iii) "without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard," SOX §§ 101(e)(6) & 107(d)(3), 15 U.S.C. §§ 7211(e)(6) & 7217(d)(3);

- the SEC exercises no control over the conduct of the Board's regular inspections, including its choices about which firms to investigate, SOX § 105(b)(1), 15 U.S.C. § 7215(b)(1), and the manner and scope of its review, *id.* § 105(b)(2), 15 U.S.C. § 7215(b)(2);
- the SEC has no authority to direct the PCAOB to investigate or to impose sanctions on the target of an investigation; instead, SEC review occurs only if the PCAOB opts for sanctions, at which point the SEC may modify or cancel the sanctions only if it makes specific statutory findings after notice and a hearing, SOX § 107(c)(2)-(3), 15 U.S.C. § 7217(c)(2)-(3);
- the SEC is *required to* ("shall") approve a proposed Board rule, "if it finds that the rule is consistent with the requirements of this Act and the securities laws, *or* is necessary or appropriate in the public interest or for the protection of investors," SOX § 107(b)(3), 15 U.S.C. § 7217(b)(3) (emphasis added), and may "abrogate, delete, or add to" such rule

only through notice-and-comment rulemaking, 15 U.S.C. § 78s(c) (made applicable by SOX § 107(b)(5), 15 U.S.C. § 7217(b)(5)); and

- the Act allows the SEC to "censure or impose limitations upon the activities, functions, and operations of the Board," only if—"*after notice and opportunity for a hearing*"—it finds on the record that the Board (i) has violated or is unable to comply with any provision of the Act, the rules of the Board or the securities laws or (ii) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule or any professional standard. SOX § 107(d)(2), 15 U.S.C. § 7217(d)(2) (emphasis added).

2. Petitioners Beckstead and Watts, an accounting firm subject to and injured by the PCAOB's regulations, inspections and investigations, and Free Enterprise Fund, an organization with members subject to the PCAOB's authority, sought a declaratory judgment that the provisions of the Act establishing the Board are unconstitutional and an injunction prohibiting the Board and its members from carrying out their powers. Pet. App. 8a, 109a-110a.

The district court entered summary judgment in favor of Respondents on all claims. Pet. App. 112a-117a. By a 2-1 decision, the Court of Appeals affirmed, concluding that the PCAOB does not violate

either the Appointments Clause or separation of powers. On the former point, the panel held that PCAOB members are inferior officers who may be appointed by the SEC because the SEC is a "Department" of which its five commissioners, acting collectively, are the "Head." Pet. App. 11a-25a. On the latter point, the panel held that in the case of inferior officers, "Congress 'may limit and restrict the power of removal as it deems best for the public interest.'" Pet. App. 36a (quoting *United States v. Perkins*, 116 U.S. 483, 483 (1886)).

Judge Kavanaugh dissented. He concluded that the Act violates separation of powers because its "unique and apparently unprecedented double for-cause removal [provisions] — an independent agency whose heads are removable for cause only by another independent agency — overruns the boundaries set by Supreme Court precedents in *Humphrey's Executor* and *Morrison* with respect to congressional encroachment on Presidential removal authority." Pet. App. 80a. He also concluded that the Act violates the Appointments Clause because its restrictions on the SEC's ability to remove PCAOB members, coupled with the lack of any other method for the SEC to manage the Board's inspections and investigations, renders Board members principal officers who must be appointed by the President with Senate confirmation. Pet. App. 90a-97a.

On November 17, 2008, the full circuit, voting 5-4, denied rehearing *en banc*. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

I. This Case Is Important and Warrants Review

As the dissenting opinion below correctly recognized, this is "the most important separation-of-powers case regarding the President's appointment and removal powers to reach the courts in the last 20 years." Pet. App. 41a. The case's importance, and the panel majority's profound constitutional errors, are further confirmed by the D.C. Circuit's closely divided 5-4 vote on rehearing *en banc*.

At every level, it is clear that this Court's review is warranted. The issues presented go to the heart of the relationship between the Legislative and Executive Branches and all agree that this is a "case of first impression" (Pet. App. 26a) because it involves a wholly unprecedented model for federal agencies.[1] The manner in which the court below resolved these novel issues is not only irreconcilable with this Court's precedent and basic separation-of-powers principles, but also expressly authorizes Congress to enact a sea change in the structure of the federal government and strip the President of his most basic means for carrying out his constitutional duties through subordinates. Finally, the Board exercises

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[1] All agree as well that the Board is a government entity for constitutional purposes notwithstanding its statutory description, *see Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995), and that its members are officers of the United States exercising executive power, *see Bowsher v. Synar*, 478 U.S. 714, 732-33 (1986); *Buckley v. Valeo*, 424 U.S. 1, 139 (1976) (per curiam).

an extraordinarily important regulatory function vital to the Nation's economy, so resolution of its constitutional status is imperative for that reason alone.

In creating the Board, Congress deliberately sought to test the outer boundaries of its ability to reduce Presidential power, by establishing a "'Fifth Branch' of the Federal Government" (Pet. App. 72a) over which the President has markedly less control than he exercises over traditional "Fourth Branch" independent agencies like the SEC, which "up to now have [reflected] the outermost constitutional limits of permissible congressional restrictions" on the President (Pet App. 67a). As the court below acknowledged, the only reason for this additional diminution of the "level of Presidential control" over executive officers was "Congress' intention to insulate the Board from partisan forces" that the President (and perhaps Congress) was purportedly able to somehow exert on a traditional independent agency like the SEC. Pet. App. 34a. Thus, Congress rejected proposals to lodge the Board's enforcement function in the SEC, *see, e.g.*, H.R. 5184, 107th Cong. (2002); H.R. 3795, 107th Cong. (2002); S. 2056, 107th Cong. (2002); S. 1896, 107th Cong. (2002), and instead designated the Board a private corporation with the same autonomy from Presidential control as private "self-regulatory-organizations (SROs) . . . such as the New York Stock Exchange," upon which it was explicitly "modeled." Pet. App. 35a n.13.

The tangible way in which Congress secured the Board's independence from the President was to prevent the President from either appointing or removing Board members, as he does for *every* other independent agency, and to deprive him of any authority to review the Board's work product or even its budget. *See supra* pp. 2-5. The Board's extremely important and concededly executive law-enforcement function is to prevent future Enron-like accounting scandals by aggressively investigating and inspecting the auditors of publicly traded companies, pursuant to an open-ended "public interest" mandate. SOX § 101(a) & (c), 15 U.S.C. § 7211(a) & (c).

The fundamental constitutional flaws in Congress' novel experiment are apparent. Since it is not possible to control or supervise subordinates whom one can neither appoint nor remove, Congress' decision to "completely strip[]" the President of *both* of these essential tools, by definition, "impermissibly burdens the President's power to control or supervise . . . an executive official[] in the execution of his or her duties." *Morrison v. Olson*, 487 U.S. 654, 692 (1988). Relatedly, since Board members have clearly been granted "massive power, unchecked by design," 148 Cong. Rec. at S6334, it seems self-evident that they are principal officers under the Appointments Clause, who must be appointed by the President and confirmed by the Senate.

The court below, however, upheld this scheme pursuant to a series of rulings that are contrary to precedent and, at a minimum, raise such serious and

novel constitutional questions that this Court should resolve them directly. First, with respect to removal, the panel majority made the truly astonishing ruling that the President has *no* constitutional prerogative to remove inferior officers because Congress has plenary authority to "'limit and restrict the power of removal as it deems best for the public interest.'" Pet. App. 17a, 36a (quoting *Perkins*, 116 U.S. at 483).

Moreover, according to the court, stripping the President of the removal (and appointment) power is perfectly acceptable because the SEC, an agency concededly independent of Presidential control, has those powers. Pet. App. 29a-31a. It is purportedly of no moment that the SEC is designed precisely to pursue policies "independent" of the President, because this Court has upheld placing the removal power in "alter ego" Cabinet officers such as the Attorney General, and "nothing in *Morrison* suggests" that there is a constitutionally cognizable difference between "the Attorney General—[who] serve[s] at the pleasure of the President"—and "independent agencies" whose Commissioners may only be removed for cause. Pet. App. 33a-34a. Finally, the fact that even the *SEC's* power to supervise the Board's policy judgments is precluded—by virtue of the Act's prohibition against removing Board members unless they engage in "willful" legal violations or abuses, or unreasonable failures to enforce—is unimportant because the SEC has the power to veto the Board's *work product* and allegedly has the *unexercised* statutory authority to usurp the Board's functions. Pet. App. 30a, 35a-36a.

With respect to the Appointments Clause, the court concluded that the same SEC power of review and unexercised power to supplant renders the Board "inferior" to SEC Commissioners—and thus allows appointment by the Commissioners—notwithstanding that Congress deliberately made the Board independent of the SEC, and severely circumscribed the Commissioners' removal power, precisely to ensure that the Board was *not* directed or supervised by an SEC subject to "partisan pressures." Pet. App. 34a.

The decision below, then, quite expressly authorizes Congress to create independent agencies that are "supervised" by *other* independent agencies, rather than by the President himself. The President's Article II prerogative to control through appointment and removal, as well as his Appointments Clause prerogative to appoint, are all satisfied if independent agencies like the SEC are provided with those powers. The Appointments Clause is satisfied because "Fifth Branch" independent agencies like the Board are "inferior" to "Fourth Branch" independent agencies like the SEC, and the SEC may appoint such "inferior officers" because it is a "Department." Under separation of powers, Congress may transfer the President's removal authority to independent agencies like the SEC both because they are no different than Presidential "alter egos" like the Attorney General (who may share the President's removal power) and because Congress can impose any removal restriction it "deems best."

If the panel majority is correct that the SEC's supervision of the Board is as constitutionally acceptable as the President's or a Cabinet official's supervision of inferior Executive Branch officers, this necessarily means that all the functions currently performed by such lower-level Executive Branch officers may be transferred to entities identical to the Board and that the supervisory functions of Cabinet officers may be transferred to independent agencies like the SEC. Thus, as the dissenting opinion emphasized and the panel majority did not contest, the decision below grants "Congress . . . [a] license to create a series of independent bipartisan boards appointed by independent agencies and removable only for cause by such independent agencies." Pet. App. 71a. This, of course, is true with respect to *every* executive function—from State to Education—so, for example, Congress could vest the authority to prosecute all federal crimes in a "Criminal Prosecution Board" whose members would be appointed and removable for cause by an independent "Criminal Justice Commission." Neither Respondents nor the panel majority even attempted to suggest any limiting principle to this analysis. There certainly is no implicit exception to the ruling below for "core" executive functions because the panel majority affirmatively stated that its analysis was *not* affected by the type of function performed by the officer at issue (Pet. App. 34a) and relied principally on this Court's decisions in *Morrison* and *Perkins*, which involved the core executive functions of criminal prosecution and military service.

It is therefore clear that the panel majority "green-li[t] Congress to create a host of similar entities" (Pet. App. 71a) to perform any executive function, allowing Congress to reduce the President to the largely symbolic and hortatory role of appointing bipartisan independent commissioners with defined tenure who, in turn, would appoint independent Boards that do the actual governing, but cannot be removed by the President in any circumstance or even by the independent agency absent offenses which would justify impeachment.

This dramatic alteration of the rules governing the organization of the federal government should not be implemented absent review by this Court, even if the panel majority's constitutional analysis were not so seriously flawed for the reasons detailed below.

Finally, while there is no split in the lower federal courts concerning the constitutional status of the recently created Board, none of the Court's cases on the Constitution's structural protections have, so far as we can discern, involved such a split. This reflects not only the rarity of such splits, but the need for the judiciary to be vigilant in policing Congress' efforts to impinge on coordinate branches even when the potential encroachment seems "innocuous." *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991) ("*MWAA*"). This is because, "as James Madison presciently noted," Congress will continually seek to "mask under complicated and indirect measures the encroachment which it makes on the co-ordinate

departments." *Id.* Here, there is nothing "innocuous" about Congress' effort to transfer a vital law enforcement function from a politically accountable President to a "private" entity precisely for the purpose of shielding it from any political accountability or "pressure" (save that from the legislators who control its existence). To the contrary, this "wolf comes as a wolf." *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting).

II. The Decision Below Is Contrary to the Court's Separation-of-Powers Precedent

"'[A]rticle [II] grants to the President the executive power of the Government, *i.e.*, the general administrative control of those executing the laws, *including the power of appointment and removal of executive officers* . . . .'" *Buckley*, 424 U.S. at 136 (quoting *Myers v. United States*, 272 U.S. 52, 117 (1926) (emphasis added)); *see also* 1 Annals of Cong. 481 (Joseph Gales ed., 1834) (remarks of Madison) ("I conceive that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws."). This power is granted to the President "to protect the liberty and security of the governed" (*MWAA*, 501 U.S. at 272) by "ensur[ing] that those who wield[]" potentially tyrannical government power are "accountable to the political force and the will of the people." *Freytag v. Comm'r*, 501 U.S. 868, 884 (1991); *see also Loving v. United States*, 517 U.S. 748, 758 (1996) ("The clear assignment of power to a branch . . . allows the citizen to know who may be

called to answer for making, or not making, those delicate and necessary decisions essential to governance."). To achieve that accountability, all government officers who wield the President's executive power must "act for him under his direction in the execution of the laws." *Buckley*, 424 U.S. at 136; *see also Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in judgment) ("[t]he Founders . . . consciously decid[ed] to vest executive authority in one person rather than several" "in order to focus . . . Executive responsibility thereby facilitating accountability"); Akhil Reed Amar, *America's Constitution: A Biography* 197 (2005) ("Article II *did* make emphatically clear from start to finish . . . that the President would be personally responsible for his branch").

Congress thus violates the separation of powers when it "impermissibly burdens the President's power to control or supervise . . . an executive official[] in the execution of his or her duties." *Morrison*, 487 U.S. at 692. The essential tool for such control is obviously the power to remove because "[o]nce an officer is appointed, it is only the authority that can remove him . . . that he must fear and, in the performance of his functions, obey." *Bowsher*, 478 U.S. at 726 (internal quotation marks omitted); *see also Myers*, 272 U.S. at 131 ("'[i]f the President should possess *alone* the *power of removal* from office, those who are employed in the execution of law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they

ought, on the President, and the President on the community'" (quoting 1 Annals of Cong. 499 (remarks of Madison)) (emphasis added)).

1. Here, the Board constitutes a wholly unprecedented effort by Congress to eliminate the President's control of executive officers to the maximum possible extent, short of assigning the appointment and removal power to itself. The panel majority's endorsement of this unprecedented encroachment is squarely at odds with this Court's decisions.

The heads of *every* other independent agency exercising the executive function are appointed and removed by the President (Pet. App. 62a), yet here the President has been deprived of both of these fundamental means of control. The President is likewise denied any direct or indirect influence over the Board's finances. The Board raises its own money outside of the congressional appropriations process through direct taxation of registered corporations, *see* SOX § 109, 15 U.S.C. § 7219, and the President has no power to review the Board's budget, including members' salaries which, at $654,000 for the Chairman and $532,000 for the other members, *see* David Katz, *Hot Times for Accounting Officials*, CFO.com (Mar. 11, 2008), far exceed that of the President and are nearly four times greater than that of SEC Commissioners. Consequently, the President is deprived of the "additional levers of influence" that, according to the panel majority, he has over traditional independent agencies, such as lending his

"'presidential goodwill' to obtain budgetary and legislative support" or using his "administrative tools" such as "centralization of . . . personnel requirements." Pet. App. 28a-29a.

Congress was also vigilant in depriving the President of any ability to influence the Board *through* the SEC. As the opinion below correctly notes, the SEC Chairman "dominates Commission policymaking," "directs the administrative side of Commission business" and "command[s] staff loyalties." Pet. App. 29a (internal quotation marks omitted; alteration in panel opinion). The Chairman, in turn, is beholden to the President because he serves as Chairman "at the pleasure of the President." Pet. App. 33a. Apparently recognizing this, Congress denied the Chairman his traditional statutory authority to "appoint and supervise personnel" (Pet. App. 25a) by vesting appointment of PCAOB members in the entire Commission, a bipartisan body less subject to Presidential influence. SOX § 101(e)(4), 15 U.S.C. § 7211(e)(4). More important, Congress made sure that the SEC would not be able to impose its policy views on Board members by affirmatively precluding the Commission from removing members for any policy-related reason, permitting removal only for "willful" law violations or "abuses" or for "fail[ing] to enforce compliance" with the Act absent "reasonable . . . excuse." SOX § 107(d)(3), 15 U.S.C. § 7217(d)(3). Thus, whatever indirect influence the President has over SEC Commissioners cannot be transformed into influence over Board members.

Congress did not pretend that this severe departure from the independent-agency norm was done for any neutral purpose or because of some peculiar characteristic of financial-accounting regulation. As noted, the avowed and exclusive purpose of modeling the Board after private organizations like the New York Stock Exchange, over whom the President obviously has no supervisory power, was to "insulate" it from the democratic process and the democratically elected President. *See supra* p. 8. Neither the panel majority nor Respondents even attempted to offer any reason why the level of Presidential control over a traditional independent agency was insufficient "insulation" or otherwise problematic.

2. Since the Act strips the President of every potential means of controlling or supervising Board members, it necessarily "impermissibly interferes with the President's exercise of his constitutionally appointed functions." *Morrison*, 487 U.S. at 685; *see also Loving*, 517 U.S. at 757; *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977). The panel majority's contrary conclusion is irreconcilable with *Morrison* and this Court's other precedent, as well as with any conception of separated powers that provides cognizable protection to the Executive against congressional encroachments.

Under *Morrison*, the test in this area is whether a congressional enactment "impermissibly burdens the President's power to control or supervise . . . an executive official[] in the execution of his or her

duties," either by virtue of a removal restriction, "taken by itself," or, if the removal restriction is acceptable, by the statute "taken as a whole." *Morrison*, 487 U.S. at 685, 692. The Act must be unconstitutional under *Morrison* because it strips the President of removal power to the maximum extent possible and, alternatively, violates *every* one of the additional, non-removal factors identified by that opinion as relevant to the separation-of-powers analysis.

First, the opinion below violates *Morrison's* threshold requirement that the *President* must have *some* power to remove. The Court's precedent and common sense establish that officers will only "obey" those who may remove them. *Bowsher*, 478 U.S. at 726. Indeed, the one constant in the Court's separation-of-powers jurisprudence is that the power to control a subordinate is dictated by the scope of the removal power. *See Edmond v. United States*, 520 U.S. 651, 664 (1997) ("[t]he power to remove officers . . . is a powerful tool for control"); *Wiener v. United States*, 357 U.S. 349, 355-56 (1958); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625-26 (1935); *Parsons v. United States*, 167 U.S. 324, 342 (1897). Since the President cannot "control or supervise an executive official" absent the ability to remove him, "the President's power to remove Executive officers . . . is . . . a necessary part of the grant of the 'executive Power.'" *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 484 (1989) (Kennedy, J., concurring). Thus, Article II is violated if the removal power is "completely stripped" from the President or an "alter-

ego" Cabinet official, for then there are "*no means* for the President to ensure the 'faithful execution' of the laws." *Morrison*, 487 U.S. at 692 (emphasis added).

Here, the President's removal power has plainly been "completely stripped." In light of the SEC's independent policy discretion,[2] it is clear—and undisputed by both the panel majority and Respondents—that the President has no power to direct the SEC to exercise its discretion to remove a Board member, any more than he could issue such directions on the "countless other discretionary decisions" the SEC makes. PCAOB D.C. Cir. Br. at 46.

While the panel majority found that the President had influence over the SEC, it did not, to its credit, suggest that such influence could somehow coerce the SEC to exercise its discretion to remove Board members. Since the President cannot order the independent SEC, unlike an "alter ego" Cabinet member, to remove a Board member, vesting the removal authority in the SEC, standing alone, clearly "completely strips" the President of any power to remove. Moreover, even the Commission cannot control or supervise how Board members choose to execute the law because the Act allows removal of Board members only for willful abuses akin to

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[2] The SEC is one of the agencies "independent of the Executive in [its] day-to day operations." *Buckley*, 424 U.S. at 133; *see also Freytag*, 501 U.S. at 916 (Scalia, J., concurring in part and concurring in the judgment); *Bowsher*, 478 U.S. at 739 (Stevens, J., concurring in the judgment).

impeachable offenses, not for any policy disagreement. *See supra* pp. 3-4.

Moreover, even if the President could justify removing a *Commissioner* for failing to fire a Board member, this would still not cause removal of the *member*. To accomplish that, the President would have to remove *all* the recalcitrant Commissioners and nominate new ones who he hoped would effectuate the removal (even though they would be obliged to remain neutral on that question because removal can only be accomplished after an *impartial* hearing, *see* SOX § 107(d)(3), 15 U.S.C. § 7217(d)(3)). And then the Senate would have to *confirm* such Commissioners, in contravention of the established principle that the "Constitution prevents Congress" from "gain[ing] a role in the removal of executive officials." *Morrison*, 487 U.S. at 686.

In short, the President cannot realistically effectuate the removal of any Board member, directly or indirectly, and any unrealistic removal scenario necessarily requires Senate concurrence. The panel majority did not attempt the Sisyphean task of explaining why this scheme does not "completely strip" the President of removal power, contenting itself with the observation that *Morrison* "did not purport to establish what removal restrictions would 'completely strip[]' the President of removal authority." Pet. App. 34a n.12 (alteration in panel opinion).

Second, even assuming *arguendo* that the removal deprivation, "taken by itself," did not unduly infringe

the executive power, *every* other factor considered in *Morrison* demonstrates that the Act, "taken as a whole," plainly does so. First, the President has no other means of influencing the Board's personnel since he cannot appoint like-minded individuals. *See Buckley*, 424 U.S. at 133, 135-36; Laurence H. Tribe, *American Constitutional Law* § 4-8, at 684 (3d ed. 2000) ("[where] officer is appointed by persons who are themselves not politically accountable . . . ongoing supervision by . . . the President or by someone serving at [his] pleasure, seems particularly important"). Second, unlike the Independent Counsel statute, the Act is not a temporary or limited interference with the President's ability to execute the law in special circumstances, but a permanent reallocation of broad policymaking authority in a free-standing agency. *See Morrison*, 487 U.S. at 691 (Independent Counsel has only "limited jurisdiction and tenure and lacks policymaking or administrative authority"). Third, far from being "justified by an overriding need" (*Nixon*, 433 U.S. at 443), such as the necessity of avoiding "conflicts of interest . . . when the Executive Branch is called upon to investigate its own high-ranking officers," *Morrison*, 487 U.S. at 677, the only explanation for not vesting the SEC or a traditional independent agency with the Board's functions is, as noted, the bare and improper desire to make the Board more "independent" of the President. *See supra* p. 8.

In short, because the Act violates both the threshold requirement of preserving some form of Presidential removal and every other factor bearing

on whether the President's ability to "control and supervise" officials has been improperly trammeled, the result below is irreconcilable with any plausible interpretation of *Morrison*.

3. Perhaps even more troubling than the holding below is the panel majority's reasoning, which fundamentally skews the proper separation-of-powers analysis by ignoring the central question of the extent of Presidential control over his subordinates and substituting an analysis which eviscerates any serious protection of executive power.

First, and most dramatically, the panel majority explicitly holds that the Constitution allows Congress to impose *any* restriction on the President's ability to appoint *or* remove inferior officers, no matter how important their function.

At Respondents' urging, the court below repeatedly stated that Congress may impose *any* restriction on the President's authority to remove an inferior officer "that Congress deems best for the public interest." Pet. App. 17a, 36a (quoting *Perkins*, 116 U.S. at 485); *see also* Pet. App. 17a ("no case prescrib[es] the ways in which Congress can restrict a principal officer's removal of his inferiors"). This rule squarely conflicts with *Morrison's* holding that Congress may not impose removal restrictions on inferior officers like the Independent Counsel to the extent they "impermissibly interfere with the President's exercise of his constitutionally appointed functions" (487 U.S. at 685), as well as this Court's consistent recognition that the President's removal

authority, far from being subject to Congress' plenary control, is a "*necessary* part of the . . . 'executive Power,'" *Pub. Citizen*, 491 U.S. at 484 (Kennedy J., concurring) (emphasis added); *see also Edmond*, 520 U.S. at 664; *Myers*, 272 U.S. at 117. And, of course, the court below also upheld completely stripping the President of his *appointment* power by vesting it in an agency which concededly makes appointments *independent* of the President. Pet. App. 28a. Thus, under the opinion below, executive officers may be appointed by independent agencies who make those selections free from Presidential influence and may be wholly immunized from removal (at least absent extraordinary wrongdoing) by either the President or the independent agency.

This complete deprivation of the *President's* control over executive *officers* necessarily prevents him from performing his constitutional duties. Contrary to the panel majority's conclusion, this deprivation is not somehow cured or rendered permissible by vesting an agency *independent* of the President with the ability—especially the *unexercised* ability—to review or supplant the *work product* of those officers. Pet. App. 29a-31a, 36a. The panel's contrary ruling is fundamentally mistaken because it erroneously equates (1) the SEC with the President or a Presidential "alter ego"; (2) supervising *officers* with reviewing an office's *work product*; and (3) *actually supervising* with a *theoretical* ability to *supplant*.

At the threshold, because the SEC is not the "hand of the President" analogous to a Cabinet officer (*In re*

Sealed Case, 838 F.2d 476, 528 n.30 (D.C. Cir. 1988) (Ginsburg, J., dissenting) (quoting *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922)), *rev'd sub nom. Morrison*), vesting it with control over Board members or policies could not possibly ameliorate the President's deprivation since, at most, it would simply mean that the Board would follow the *SEC's independent* policies. Moreover, even assuming that *SEC* control over Board members would satisfy Article II, the SEC cannot require Board members to pursue even the SEC's policies because it cannot remove members for pursuing policies the SEC views as fundamentally misguided. *See supra* pp. 3-4.

The panel majority found that the SEC's inability to control how *Board* members performed *their* regulatory functions through removal was not a "functional concern [of] constitutional dimension" because "the Commission can *withdraw* or *preempt* any aspect of the Board's *substantive* regulatory authority." Pet. App. 30a (quoting U.S. D.C. Cir. Br. at 50 (emphasis added)). But the question under separation of powers and the Appointments Clause, respectively, is whether executive officials are "control[led] or supervised" or "directed and supervised" by the President or one of his department heads. *See Morrison*, 487 U.S. at 692; *Edmond*, 520 U.S. at 663. Such supervision requires some ability to direct or control how the officers perform *their* functions in the first instance. The SEC's ability to "preempt" the Board's proposed rules and sanctions is not supervision of how Board members do their job; it

is a *post hoc* review of the Board's collective work product.

Even more obviously, the SEC's purported and wholly unexercised statutory authority to "*withdraw*" and *take over* the Board's inspection and investigative functions cannot possibly be equated with supervising the Board's exercise of those functions. Nor does it change the fact that the Board *is* performing those functions free from Presidential control. The only relevant question is whether the President has sufficient control over "those executing the laws" against Petitioners (*Buckley*, 424 U.S. at 136), not whether he adequately controls those who might theoretically execute the laws in the future.

Yet, under the panel majority's revolutionary regime, Congress can authorize officers who are concededly beyond any Presidential control to perform critical executive functions simply by vesting a constitutionally compliant agency with the *discretion* to assume that executive function in the future. The panel majority apparently believed that it must treat the SEC's theoretical ability to take over the Board's functions as if the SEC had actually done so because such fictions are somehow required in "facial" challenges to unconstitutional entities. Pet. App. 37a n.14. But, of course, Petitioners need only show that "no set of circumstances *exist*" in which the *Board*—the entity actually regulating Petitioners—is constitutional, *United States v. Salerno*, 481 U.S. 739, 745 (1987); they obviously need not show that a *different* regulator would also be unconstitutional if

the circumstances dramatically change—*i.e.*, if the SEC ever does assume the Board's regulatory functions. For example, if a statute empowered an agency's ALJs to adjudicate Article III controversies, affected litigants could challenge the propriety of the ALJ's adjudication as "facially" unconstitutional, even if the statute authorized the Department Head to transfer the cases to the proper Article III courts.

In short, the panel majority's bizarre requirement that separation-of-powers litigants show that any conceivable alteration of the present unconstitutional situation would also be unconstitutional, by itself, warrants review and reversal by the Court.

III. The Decision Below Is Contrary to the Court's Appointments Clause Precedent

The foregoing establishes that the Act violates separation-of-powers principles even assuming that Board members are inferior officers who may be appointed by "Heads of Departments" under the Appointments Clause (and even assuming that SEC Commissioners are Department Heads). It is quite clear, however, that Board members are principal officers who may only be appointed by the President with the advice and consent of the Senate, and the panel majority's fundamentally mistaken contrary conclusion separately warrants this Court's review.

At the most basic level, common sense and historical practice compel the conclusion that Board members are principal officers, not subordinates of the SEC Commissioners. The Board is not subject to

any governmental chain of command, or public oversight, because Congress designated it a "corporation" whose members are *not* "officer[s] . . . or agent[s] for the Federal Government." SOX § 101(b), 15 U.S.C. § 7211(b). As noted, Congress consciously chose this private New York Stock Exchange model precisely to render the Board independent of the SEC and its attendant "partisan" pressures. *See supra* p. 8. Moreover, Board members exercise extraordinary autonomy and power, raising their own revenue through direct taxation and establishing standards for "all accountants and everyone they work for, which directly or indirectly is every breathing person in the country," 148 Cong. Rec. at S6334, pursuant to a broad "public interest" mandate, *see* SOX § 101(a), 15 U.S.C. § 7211(a). Board members' salaries are also nearly four times larger than their alleged "superiors" at the SEC. *See supra* p. 16.

As even the panel majority conceded, if the Board is acknowledged to be the "independent agency" it so obviously is, the conclusion that its members are principal officers "conveniently follows." Pet. App. 30a n.9. This is because the heads of *all* such agencies or quasi-governmental corporations are appointed by the President with Senate confirmation (Pet. App. 62a)—reflecting the historical consensus that those who run their own "shops" are necessarily superior officers. Consequently, in order to avoid the inexorable conclusion that Board members are principal officers if the Board is "independent," the panel majority mischaracterized the Board as a "heavily controlled component of the SEC." Pet. App.

29a-30a; *see also* Pet. App. 33a (Board is "entity within the Executive Branch"). This basic error, particularly when coupled with the court's related error that independent agencies are "Departments" under the Appointments Clause, both undermines *every* purpose of that Clause identified by *any* Justice and provides a blueprint for Congress to dramatically remake the *status quo* by stripping the President of his ability to appoint officials exercising extraordinary executive power.

Under the panel majority's opinion, the head of an agency whose work product is subject to review by another federal officer is *ipso facto* an inferior officer. Pet. App. 12a-13a. Under this standard, officials as powerful and autonomous as the heads of the CIA, IRS, FDA, FAA and Joint Chiefs of Staff—all currently Presidential appointees—are inferior officers because their work product is, or at least potentially is, subject to review by higher-ranking executive officers.[3] Thus, the panel majority's test for inferior officers, if left unattended, would directly undermine the fundamental purposes of a "Clause designed to preserve political accountability relative to important Government assignments." *Edmond*, 520 U.S. at 663. Permitting such important officers to take office without "the joint participation of the President and Senate" would allow the political branches to evade "public accountability for both the making of a bad appointment and the rejection of a

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[3] *See, e.g.*, 50 U.S.C. § 403-4a(b); 26 U.S.C. § 7801(a)(1); 21 U.S.C. § 393(d)(2); 49 U.S.C. § 106(f)(3)(B)(i); 10 U.S.C. § 153(a).

good one." *Id.* at 660; *see also Freytag*, 501 U.S. at 884; *Weiss v. United States*, 510 U.S. 163, 188 n.3 (1994) (Souter, J., concurring) ("if Congress. . . authorizes a lower level Executive Branch official to appoint a principal officer, it . . . has adopted a more diffuse and less accountable mode of appointment than the Constitution requires"). Further, granting the appointment power to *independent* agencies, for whom the democratically elected President is *not* responsible, would undermine the "Framers' determination to limit the distribution of appointment power" in order to "ensure that those who wield[] it were accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884. "This process . . . deprives the public of any realistic ability to hold easily identifiable elected officials to account for bad appointments." *Weiss*, 510 U.S. at 191 (Souter, J., concurring).

Indeed, the opinion below seems consciously designed to guarantee that all involved can *evade* accountability if Board members fail to unearth Enron-like accounting fraud. The President would obviously not be responsible for failures of officials he could not select or replace; the SEC Chairman would not be responsible because his appointment powers have been diffused to all the Commissioners; and the Commissioners would also not be responsible because there is an inherent "lack of accountability in appointments by a . . . multimember executive," *Freytag*, 501 U.S. at 904-05 (Scalia, J., concurring) and, in any event, they have no extant mechanism for reviewing the Board's failures to investigate and

cannot remove Board members for such mistakes in judgment. Thus, if the central issue in a Presidential re-election campaign were the Board's failure to adequately police the financial markets (analogous to our most recent election), the incumbent would not be accountable for the Board's failures, and the new President could not remove the members that he, and the American public that elected him, view as incompetent.

Finally, the Act commits the cardinal sin of "aggrandiz[ing] [Congress'] own appointment power" by allowing it to influence "through indirection" (*Weiss*, 510 U.S. at 187 (Souter, J., concurring)) the SEC Commissioners who, because they are not the President's "direct lieutenants," have no "means to resist legislative encroachment[s] upon th[e] [appointment power]." *Freytag*, 501 U.S. at 906 (Scalia, J., concurring). At the same time, Congress would bear no accountability for the Commission's bad appointments because the Senate has not confirmed them.

In short, a definition of inferior officer which ensnares such autonomous and powerful officials must be wrong. The panel majority arrived at this unprecedented and extraordinarily counter-intuitive result only by mangling *Edmond's* "direction and supervision" test, for reasons similar to those that skewed its separation-of-powers analysis.

First, particularly since the Appointments Clause deals only with "Officers," it is clear that a superior must directly supervise the *Officer*, not just review

the Officer's substantive work, in order for that official to be inferior. Thus, for example, it is well-established that "United States district judges cannot be inferior officers, since the power of appellate review does not extend to them personally, but is limited to their judgments." *Edmond*, 520 U.S. at 667 (Souter, J., concurring). Here, in stark contrast to the Judge Advocate General's power to remove the judges in *Edmond* "*without cause*" and to otherwise exercise extensive "administrative oversight" of them, *id.* at 664 (majority opinion) (emphasis added), the SEC has no supervisory power over the Board members personally, since it cannot review their individual performance or remove them for inefficiency or policy mistakes.

As noted, the panel majority did not find that the SEC is authorized to remove for poor performance, but simply discounted this "powerful tool for control" (*Edmond*, 520 U.S. at 664) as having any real significance, because it concluded that "what is key under the *Edmond* analysis is the fact that Board members 'have no power to render a final decision on behalf of the United States.'" Pet. App. 13a (quoting *Edmond*, 520 U.S. at 665). This is plainly incorrect. The extremely narrow removal provision here necessarily precludes any finding of "direction and supervision" because removal *is* key and the entire point of such restrictive provisions is to make clear that Board members are free from SEC policy direction. And many principal officers, like the heads of the FDA and IRS, cannot take "final," legally

binding action absent potential review by other officials. *See supra* note 3.

Second, and in any event, the SEC does not direct and supervise even the Board's work product, since there is concededly no statutory provision, analogous to those authorizing SEC review of the Board's rules and sanctions, for reviewing or supervising the Board's critical investigative and inspection functions. As the dissenting opinion correctly noted, the SEC's power to review *rules* and *sanctions* is not remotely sufficient to "direct and supervise" the Board's key decisions on whether to initiate or drop an *investigation*, any more than "[a]fter-the-fact judicial or quasi-judicial review" of a prosecutor's decision suggests that the court is somehow "supervising" the prosecutor. Pet. App. 92a. Moreover, if the SEC ever does exercise its alleged authority to transfer the Board's investigative activities to itself, this would simply *supplant* the Board's functions; it would not supervise how the Board conducts those functions. *See* Pet. App. 93a ("Congress may switch regulatory authority from one agency to another, but that does not make the initial agency 'directed and supervised' by Congress").

Third, it is clear that direction and supervision by a superior, particularly of the officer's work product, while "necessary for inferior officer status," is "not sufficient to establish it." *Edmond*, 520 U.S. at 667 (Souter, J., concurring). Again, the contrary view would mean that officials such as the Solicitor General and all Deputy Secretaries are inferior

officers simply because they are subject to oversight by the head of a department.

Fourth, the panel majority found that the Board satisfied the "direction and supervision" test principally because the "Board's ability to act independently is dwarfed by the 'independent discretion [of the Independent Counsel] to exercise the power delegated to her under the [Ethics in Government] Act.'" Pet. App. 14a (quoting *Morrison*, 487 U.S. at 681); *see also* Pet. App. 14a n.3. But *Morrison* "explicitly" did "*not* purport to set forth a definitive test for whether an office is 'inferior' under the Appointments Clause" (*Edmond*, 520 U.S. at 661 (emphasis added)), did not even consider whether the Independent Counsel was directed and supervised as part of its "inferior officer" analysis, and applied a four-factor test that would necessarily render the Board members principal officers because it primarily focused on whether the officer has "limited duties" and "tenure" and "jurisdiction." *Id.* (citing *Morrison*, 487 U.S. at 671-72.)

Thus, the Independent Counsel obviously cannot be used as a benchmark for assessing how much direction and supervision is adequate where, as here, the offices at issue are permanent and have broad jurisdiction. Any such rule would render the *Edmond* test utterly toothless because the Independent Counsel had virtually no "direction and supervision" over her case-specific judgments. At a minimum, if there is tension between *Morrison* and *Edmond* on how to determine the inferior status of permanent

offices, the Court needs to resolve that fundamental confusion.

Finally, the panel majority's sharp departure from precedent and historical practice raises a host of unresolved issues and creates the potential for chaos. Here, for example, if Board members truly are "inferior," then all officers working at the Board—such as the Chief Auditor, who plainly "exercise[s] significant authority pursuant to the laws of the United States" (*Buckley*, 424 U.S. at 126)—are appointed unconstitutionally because "inferior officers" have no power to appoint. Similar issues would occur at the other agencies, mentioned above, *see supra* p. 29 & note 3, whose heads are erroneously designated "inferior officers" under the decision below. For this reason alone, it is important for the Court to review the decision below and provide guidance on this and similar complications.

IV. The Opinion Below Commits Other Basic Legal Errors

Although the opinion below should be reviewed and reversed based on the fundamental errors set forth above, the panel majority's statutory and Appointments Clause analysis contains additional, important flaws also warranting review.

1. First, with respect to the Act, the panel was plainly wrong in concluding that Congress, at the same time it was consciously separating the Board from the SEC and vesting it with its own specific statutory responsibilities, nonetheless simultane-

ously authorized the SEC, at its discretion, to render the Board a Potemkin village full of idle, well-paid officers, by usurping all of the Board's functions. It is the Board, not the Commission, that is expressly given the authority and duty to "register," "investigate" and "establish standards" for "registered public accounting firms" and to "assess and collect accounting support fees" from publicly registered corporations. SOX § 101(c)(1)-(4) & (f)(5), 15 U.S.C. § 7211(c)(1)-(4) & (f)(5). While the Board exercises this statutory authority "'subject to action by the Commission under section [107, 15 U.S.C. §] 7217,'" that section "gives the SEC power to review only Board *rules*," but "does not give the SEC power to direct or supervise Board *inspections, investigations, and enforcement actions*." Pet. App. 94a-95a (quoting SOX § 101(c), 15 U.S.C. § 7211(c); footnotes omitted). And while, as the panel majority correctly noted, the Act "*preserves*" the Commission's existing authority (Pet. App. 19a) by saying that the new "Act" did not "impair or limit" SEC authority (SOX § 3(c), 15 U.S.C. § 7202(c)), this manifestly does not *grant* the Commission any new authority or any ability to usurp the Board's new authority. Thus, the Commission has no power to implement the Act's new requirements concerning inspection, investigation and sanctioning of auditors, or to collect the fees that support such activity.

Moreover, with respect to the Commission's ability to *limit* (rather than usurp) the Board's activities, the panel majority simply ignored the statutory provision which deals directly with that very issue, presumably

because that provision makes clear that such "limitations" may be imposed *only* if the SEC finds, after a hearing, that the Board has "violated" the securities laws, is "unable to comply" with those laws or, "without reasonable justification or excuse," has failed to enforce them. SOX § 107(d)(2), 15 U.S.C. § 7217(d)(2). The SEC may stop the Board from acting, then, only where the Board has grossly abused its authority. Contrary to the opinion below, the SEC's general power to issue regulations "in furtherance of the Act" plainly does not allow it to limit or take over the Board's functions. Pet. App. 19a-20a. Any such SEC action cannot "further some aspect of the Act" both because it would render the specific provision governing Board "limitations" a nullity and because the Act "nowhere gives the SEC authority to direct and supervise Board inspections, investigations, and enforcement actions." Pet. App. 95a. Thus, the Commission could no more directly supervise or take over the Board's investigatory powers than it could directly collect fees from public corporations.[4]

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[4] The panel majority was so intent on expanding the SEC's supervisory powers that it interpreted the statutory requirement that the SEC "shall" approve all Board rules that are either consistent with the Act "*or*" the public interest, SOX § 107(b)(3), 15 U.S.C. § 7217(b)(3) (emphasis added), to require SEC approval only if the SEC finds the rule consistent with the statute "*and*" the public interest. Pet. App. 15a (emphasis in panel opinion). But it obviously constitutes "radical surgery" and "distorts the plain meaning of the [Act] to substitute the word 'or' for the word 'and.'" *Chisom v. Roemer*, 501 U.S. 380, 397 (1991).

2. In addition, contrary to the panel majority's conclusion, the Act violates the Appointments Clause even if Board members are inferior officers because the SEC is not a "Department" and its Commissioners, acting collectively, are not the SEC's "Head."

As this Court made clear in *Freytag*, the term "Department" in the Appointments Clause is confined only to those agencies that resemble a cabinet department and, most significantly, only those the "heads [of which] are subject to the exercise of political oversight and share the President's accountability to the people." 501 U.S. at 886; *see also id.* at 906-07 (Scalia, J., concurring) (noting that the key defining factor of a "department" is an office run by someone who is a "direct lieutenant[]" "directly answerable" to the President). As an independent agency over which the President has limited control, the SEC has the exact same characteristics that caused this Court to hold in *Freytag* that the Tax Court did not qualify as a "Department." *See id.* at 885-87.

As the district court held (Pet. App. 113a-114a), the five SEC commissioners are also not the "Head" of the SEC because the "Framers recognized the dangers posed by an excessively diffuse appointment power" beyond a single person. *Freytag*, 501 U.S. at 885. Rather, if there is a "Head" of the SEC, it is the Chairman, who, as the panel recognized, "directs" administrative and personnel actions and "dominates commission policymaking." Pet. App. 28a-29a; *see*

also Pet. App. 113a-114a; Reorganization Plan No. 10 of 1950 § 1(a), 15 Fed. Reg. 3175 (May 25, 1950), *reprinted in* 5 U.S.C. app. at 567-68 (2006) (delegating Chairman "executive and administrative functions" under President's power to "provi[de] for the appointment and compensation of the *head* . . . of any agency," Reorganization Act of 1949, Pub. L. No. 109, § 4(2), 63 Stat. 203, 204, *codified as revised at* 5 U.S.C. § 904(2) (emphasis added)). The panel majority's contrary conclusion renders *all* inferior officers at the SEC unconstitutional, because they have been appointed by the *Chairman*, not the multi-member Commission "Head."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 5, 2009

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5127 **September Term 2008**

06cv00217

Filed On: November 17, 2008

Free Enterprise Fund
and Beckstead and Watts, LLP,

Appellants

v.

Public Company Accounting
Oversight Board, et al.,

Appellees

BEFORE: Sentelle*, Chief Judge, and Ginsburg*, Henderson, Rogers, Tatel, Garland, Brown, Griffith*, and Kavanaugh*, Circuit Judges

ORDER

Appellants' petition for rehearing en banc and the responses thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

FOR THE COURT:
Mark J. Langer, Clerk

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* Chief Judge Sentelle, and Circuit Judges Ginsburg, Griffith, and Kavanaugh would grant the petition for rehearing en banc.

BY: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 15, 2008 Decided August 22, 2008

No. 07-5127

FREE ENTERPRISE FUND AND BECKSTEAD AND WATTS, LLP,
APPELLANTS

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 06cv00217)

Michael A. Carvin argued the cause for appellants. With him on the briefs were *Viet D. Dinh*, *Sam Kazman*, *Hans F. Bader*, *Christian G. Vergonis*, and *Kenneth W. Starr*.

Elizabeth Gallaway and *William P. Pendley* were on the brief for *amicus curiae* Mountain States Legal Foundation.

Daniel J. Popeo, *Paul D. Kamenar*, *Helgi C. Walker*, and *Thomas R. McCarthy* were on the brief for *amicus curiae* Washington Legal Foundation in support of appellants.

Jeffrey A. Lamken argued the cause for appellees Public Company Accounting Oversight Board, et al.

With him on the brief were *Joe Robert Caldwell Jr.* and *James R. Doty*.

Mark B. Stern, Attorney, U.S. Department of Justice, argued the cause for appellee United States of America. With him on the brief were *Jeffrey S. Bucholtz*, Acting Assistant Attorney General, *Jeffrey A. Taylor*, U.S. Attorney, *Mark R. Freeman*, Attorney, *Brian G. Cartwright*, General Counsel, Securities & Exchange Commission, *Andrew N. Vollmer*, Deputy General Counsel, *Jacob H. Stillman*, Solicitor, and *John W. Avery*, Special Counsel. *Robert J. Katerberg*, Attorney, U.S. Department of Justice, and *R. Craig Lawrence*, Assistant U.S. Attorney, entered appearances.

Richard H. Pildes was on the brief for *amici curiae* G. Bradford Cook, et al.

Ira M. Millstein, *Gregory S. Coleman*, and *Christian J. Ward* were on the brief for *amicus curiae* Council of Institutional Investors in support of appellees.

Before: ROGERS, BROWN and KAVANAUGH, *Circuit Judges*.

Opinion for the court by *Circuit Judge* ROGERS.

Dissenting opinion by *Circuit Judge* KAVANAUGH.

ROGERS, *Circuit Judge*: In this facial challenge, appellants contend that Title I of the Sarbanes-Oxley Act of 2002 ("the Act"), 15 U.S.C. §§ 7211-19, violates the Appointments Clause of the Constitution and separation of powers because it does not permit adequate Presidential control of the Public Company Accounting Oversight Board ("the Board"). Congress, however, made the Board's exercise of its duties

subject to the comprehensive control of the Securities and Exchange Commission ("the Commission"). Under the Act, the Commission is empowered to set Board rules and procedures, to overturn any sanction proposed by the Board, and to limit or relieve the Board of its powers, *id.* §§ 7217(b)(2), (b)(5), (c)(3), (d)(1), (2); the Commission also may remove members of the Board for cause, *id.* § 7211(e)(6). Members of the Commission, in turn, are appointed by the President with the advice and consent of the Senate and subject to removal by the President for cause; its chairman is selected by and serves at the pleasure of the President. In appellants' view this statutory scheme vests Board members "with far reaching executive power while completely stripping the President of the authority to appoint or remove those members or otherwise supervise or control their exercise of that power." Appellants' Br. at 1. But their facial challenge ignores the entirety of the statutory scheme and runs afoul of the Supreme Court's instruction regarding the nature of the President's constitutional relationship with independent administrative agencies. Supreme Court precedent as we have it does not support appellants' singular focus on removal powers as the be-all and end-all of Executive authority, but rather compels a more nuanced approach that examines the myriad means of Executive control.

We hold, first, that the Act does not encroach upon the Appointment power because, in view of the Commission's comprehensive control of the Board, Board members are subject to direction and supervision of the Commission and thus are inferior officers not required to be appointed by the President. Second, we hold that the for-cause limitations on the

Commission's power to remove Board members and the President's power to remove Commissioners do not strip the President of sufficient power to influence the Board and thus do not contravene separation of powers, as that principle embraces independent agencies like the Commission and their exercise of broad authority over their subordinates. Accordingly, we affirm the grant of summary judgment to the Board and the United States.

I.

Following the Enron and Worldcom accounting scandals that exposed serious weaknesses in industry self-regulatory reporting requirements for certain publicly held companies, Congress enacted the Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 7201 *et seq.*[1] Title I of the Act established the Board "to oversee the audit of public companies that are subject to the securities laws . . . in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports." 15 U.S.C. § 7211(a). The five members of the Board are appointed by the Commission after consultation with the Chairman of the Board of Governors of the Federal Reserve and the Secretary of the Treasury. *Id.* § 7211(e)(4)(A). The Act empowers the Board, subject to the oversight of the Commission, to, among other things, register public accounting firms, establish auditing and ethics standards, conduct inspections and investigations of registered firms, impose sanctions, and set its own

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[1] *See* S. REP. No. 107-205, at 2 (2002); H. R. REP. No. 107-414, at 18-19 (2002).

budget, which is funded by annual fees. *Id.* §§ 7211(c), 7219(c), (d).

The Commission's authority over the Board is explicit and comprehensive. *Id.* §§ 7217, 7218. Indeed, it is extraordinary. The Board could commence operations only upon the Commission's determination that it was properly organized and had appropriate rules and procedures in place, *id.* § 7211(d), and "[n]o rule of the Board shall become effective without prior approval of the Commission," *id.* § 7217(b)(2). The Commission is empowered to "abrogate, add to, and delete from" the Board's rules "to assure the fair administration of the [Board], conform the rules promulgated by that Board to the requirements of title I of the [Act], or otherwise further purposes of that Act, the securities laws, and the rules and regulations thereunder applicable to that Board." *Id.* §§ 7217(b)(5), 78s(c). In addition to these *ex ante* controls, all Board adjudications are subject to the Commission's *de novo* review, *id.* § 7217(c)(2); *Nat'l Ass'n of Sec. Dealers, Inc. v. SEC*, 431 F.3d 803, 804 (D.C. Cir. 2005) ("*NASD*"), upon an immediate stay when an application for review is filed or *sua sponte* by the Commission, 15 U.S.C. §§ 7215(e)(1), 7217(c)(2)(A). The Commission is empowered to "enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board." *Id.* § 7217(c)(3). The Commission alone determines whether the Board may "sue and be sued" in any court. *Id.* § 7211(f)(1). A member of the Board may be censured or removed from office "for good cause shown," *id.* § 7211(e)(6), upon a finding by the Commission, after notice and opportunity for a hearing, that the member willfully violated the Act or abused authority, or failed to enforce compliance with

a rule or standard without reasonable justification, *id.* § 7217(d)(3). The Commission is further empowered, by rule, to relieve the Board, consistent with the public interest, of any enforcement authority whatsoever, *id.* § 7217(d)(1), as well as, by order, to censure the Board and, after notice and opportunity for a hearing, to "impose limitations upon the activities, functions, and operations of the Board" upon finding that the Board has failed to abide by its statutory duties, *id.* § 7217(d)(2).

This facial challenge to the Act is brought by the Free Enterprise Fund, a non-profit public interest organization that "promotes economic growth, lower taxes, and limited government." Compl. ¶ 11. It is joined by one of its members, Beckstead and Watts, LLP ("B&W"), a Nevada accounting firm that is registered with the Board and is subject to an ongoing formal investigation that was commenced in 2005. *Id.* ¶ 79. On February 7, 2006, the Free Enterprise Fund and B&W (collectively "the Fund") filed a complaint alleging that the creation of the Board violated the Appointments Clause, separation of powers, and non-delegation principles. The Fund sought declaratory and injunctive relief prohibiting the Board from carrying out its duties, including taking "any further action" against B&W. The United States intervened to defend the constitutionality of the Act. The district court denied the Board's motion to dismiss the complaint for lack of jurisdiction and granted the motions for summary judgment of the Board and the United States.

The Fund appeals, and our review is *de novo*. *See Simpson v. Socialist People's Libyan Arab Jamahiriya*, 470 F.3d 356, 359 (D.C. Cir. 2006);

Wilson v. Pena, 79 F.3d 154, 160 n.1 (D.C. Cir. 1996). To succeed in its facial challenge to Title I of the Act under the Appointments Clause and separation of powers,[2] the Fund bears a heavy burden to show that the provisions of which it complains are unduly severe in all circumstances and cannot be constitutionally applied. *See Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

II.

The Board and the United States contend, as a threshold matter, that the district court lacked jurisdiction because the Fund failed to exhaust the Act's statutory review procedures. The Act permits a person "aggrieved by a final *order* of the Commission" or a person "adversely affected by a *rule* of the Commission" to obtain review in the court of appeals. 15 U.S.C. § 78y(a)(1), (b)(1) (emphasis added). The Act further provides that "[n]o objection to an *order* or *rule* of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so." *Id.* § 78y(c)(1) (emphasis added). The Fund did not pursue administrative remedies before filing its complaint.

As a matter of statutory text, the administrative procedures available under the Act are confined to challenges to an "order" or a "rule" of the Board. *See, e.g., Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d

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[2] The Fund does not pursue its non-delegation claim on appeal.

849, 856 (D.C. Cir. 2002); *Gen. Elec. Co. v. EPA*, 360 F.3d 188, 191 (D.C. Cir. 2004). The Fund's facial challenge, by contrast, advances a "broad-scale attack," *Nat'l Mining*, 292 F.3d at 856, to the Act itself that is not "of the type Congress intended to be reviewed within this statutory structure," *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212 (1994). In *Thunder Basin*, the Supreme Court acknowledged that the district court retains jurisdiction over claims "considered 'wholly collateral' to a statute's review provisions and outside the agency's expertise." 510 U.S. at 212 (quoting *Heckler v. Ringer*, 466 U.S. 602, 618 (1984)).

Jurisdiction over the Fund's complaint is consistent with the distinction drawn by this court in *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), which held that the district court has "general federal question jurisdiction to consider a facial challenge to a statute's constitutionality so long as that challenge is not raised in a suit challenging the validity of agency action taken pursuant to the challenged statute or in a suit that is collateral to one challenging the validity of such agency action," *id.* at 965. Because the complaint presents a "facial, or systemic" challenge, and not an "as-applied, or particularized challenge[]," *Gen. Elec.*, 360 F.3d at 192 (internal quotation marks omitted), and does not attempt to bootstrap other claims regarding a Board order or rule, *see First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 695 (3d Cir. 1979), the Fund's lawsuit is not properly viewed as a circumvention of the Act's review procedures. In contrast with *American Coalition for Competitive Trade v. Clinton*, 128 F.3d 761 (D.C. Cir. 1997), where the statute granted the court of appeals

exclusive jurisdiction over all constitutional attacks on the statute upon compliance with exhaustion requirements, *see id.* at 765, the Act contains no similar provision as would indicate that Congress intended the review scheme to be exclusive.

Therefore, because the Fund's constitutional challenges to the Act are collateral to the Act's administrative review scheme, the exhaustion doctrine does not apply, and we hold that the district court had subject matter jurisdiction over the complaint and properly denied the motion to dismiss.

III.

The Appointments Clause provides:

> [The President] shall . . . nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2.

The plain text of the Appointments Clause thus contemplates that Congress may lodge the appointment power of inferior officers in entities other than the President. The Fund contends, however, that the absence of day-to-day supervision of the Board by the Commission and the for-cause limitation on the Commission's power to remove Board members means that Board members are not

inferior officers and therefore must be appointed by the President. Alternatively, the Fund contends that even if Board members are inferior officers, they cannot be appointed by the Commission because the Commission is not a "Department[]" and the Commissioners are not its "Head[]."

A.

"Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior." *Edmond v. United States*, 520 U.S. 651, 662 (1997). Under this standard, the Board is composed of officers inferior to the Commission. The Commissioners, who serve staggered five-year terms, are "appointed by Presidential nomination with the advice and consent of the Senate," *id.* at 663, and they exercise comprehensive control over Board procedures and decisions and Board members. For instance, the Commission approves all Board rules, 15 U.S.C. §§ 7211(g), 7217(b)(2), and may abrogate, delete, or add to them, *id.* § 7217(b)(5). All Board sanctions are subject to plenary review by the Commission, *id.* § 7217(c)(2); *NASD*, 431 F.3d at 804, and the Commission "may enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board," *id.* § 7217(c)(3). As such, the Board's disciplinary authority "ultimately belongs to the [Commission], and the legal views of the [Board] must yield to the Commission's view of the law," *NASD*, 431 F.3d at 806; *see also Gold v. SEC*, 48 F.3d 987, 990 (7th Cir. 1995); *Shultz v. SEC*, 614 F.2d 561, 568 (7th Cir. 1980). The Commission both appoints and removes Board members, *id.* §§ 7211(e)(4)(A),

(e)(6). It also may impose limitations upon Board activities, *id.* § 7217(d)(2), and relieve the Board of its enforcement authority altogether, *id.* § 7217(d)(1).

Consequently, the Board's work is necessarily "directed and supervised at some level" by the Commission, *Edmond*, 520 at 663. Notably for purposes of this facial challenge, the Act subjects Board members to greater supervision than the Coast Guard judges in *Edmond*, whom the Supreme Court held were inferior officers even though supervision of the judges was fractured between two different bodies, *id.* at 664, and their decisions were not subject to *de novo* review, *id.* at 665. Contrary to the Fund's suggestion, the fact that the Board is charged with exercising extensive authority on behalf of the United States does not mean that Board members must be appointed by the President, for principal as well as inferior officers, by definition, "'exercis[e] significant authority pursuant to the laws of the United States,'" *Freytag v. CIR*, 501 868, 881 (1991) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)); *see also Edmond*, 520 U.S. at 662. Instead, what is key under the *Edmond* analysis is the fact that Board members "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers," *Edmond*, 520 U.S. at 665. The Act vests a broad range of duties in the Board, 15 U.S.C. § 7211(c), but its exercise of those duties is subject to check by the Commission at every significant step.

Board members are also subject to greater oversight than the Independent Counsel in *Morrison v. Olson*, 487 U.S. 654, 662 (1988). Whereas the Act specifies that every decision of the Board is "subject

to action by the Commission," 15 U.S.C. § 7211(c), the Ethics in Government Act vested the Independent Counsel with "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice," 28 U.S.C. § 594(a). Still the Supreme Court adjudged that the Independent Counsel was an inferior officer. *Morrison*, 487 U.S. at 671. The Board's ability to act independently is dwarfed by the "independent discretion [of the Independent Counsel] to exercise the powers delegated to her under the [Ethics in Government] Act," *Morrison*, 487 U.S. at 671.[3]

The Fund is incorrect in suggesting that the Commission's review authority of Board rules and regulations is "severely circumscribed," Appellants' Br. at 34. The Act provides that the Commission "shall approve a proposed rule, if it finds that the rule is consistent with the requirements of this Act and the securities laws, or is necessary or appropriate in the public interest or for the protection

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[3] *Morrison* presents a significant obstacle to our dissenting colleague's proposed test for inferior officer status, Dis. Op. at 45-46, because the Independent Counsel had broad final decision-making authority unchecked by any other Executive officer. The dissent's attempt to limit *Morrison* to situations in which the office is temporary, *id.* at 45 n.17, ignores the fact that the Supreme Court has rejected the interpretation of *Morrison* as a bright-line test, *see Edmond*, 520 U.S. at 661. But even assuming that the temporariness of the position was the linchpin in view of the Independent Counsel's extraordinarily broad powers, the Supreme Court has never suggested that *Morrison* has no relevance to the inferior officer analysis for offices that, while not temporary, possess powers that are significantly more constrained. Inconvenient precedent is not so easily disposed of.

of investors." 15 U.S.C. § 7217(b)(3). This provision does not, as the Fund offers, establish a deferential, *Chevron*-like review but reflects an intent to require the Commission itself to determine whether Board rules are consistent with the statutes *and* the public interest. Given the Commission's several statutory responsibilities, the Fund's approach would sanction flouting one statutory goal in service of another, an untenable interpretation of congressional intent where the goals can be reconciled. *Cf. Richards v. United States*, 369 U.S. 1, 11 (1962). Moreover, in *Edmond* the Supreme Court held that the "limitation upon review does not . . . render the judges of the Court of Criminal Appeals principal officers." 520 U.S. at 665. The Fund ignores that the Commission's regulatory control does not end with its review of Board rules. The Act empowers the Commission to abrogate or amend Board rules "to assure the fair administration of the [Board], conform the rules promulgated by that Board to the requirements of title I of the [Act], or otherwise further the purposes of that Act, the securities laws, and the rules and regulations thereunder applicable to that Board." 15 U.S.C. § 7217(b)(5). The Commission itself is also empowered to promulgate rules in furtherance of the Act. *Id.* § 7202(a). These powers are inimical to *Chevron*-like deference.

To the extent the Fund suggests that the for-cause limitation on the Commission's removal power requires Board members to be deemed principal officers, it overinflates the importance of removal authority. Recognizing that "[t]he power to remove officers . . . is a powerful tool for control," *Edmond* 520 U.S. at 664, the Supreme Court has indicated that courts should consider removal authority as one

factor in determining whether an official is an inferior officer, *id.* at 666.[4] The Court has held that both the Coast Guard Judges in *Edmond*, who were subject to the Judge Advocate General's at-will removal authority, 520 U.S. at 664, and the Independent Counsel in *Morrison*, who was subject to removal only for cause, 487 U.S. at 663, were inferior officers. Here, the Act vests removal authority in the Commission, providing that "[a] member of the Board may be removed by the Commission from office, in accordance with section [107(d)(3)], for good cause shown." 15 U.S.C. § 7211(e)(6).[5] Just as in *Morrison*,

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[4] Our dissenting colleague's reading of *Edmond* to mean that at-will removal authority is "the key initial question," Dis. Op. at 42, is curious in light of the Supreme Court's cursory consideration of this factor in determining that the Coast Guard judges were inferior officers, *see Edmond*, 520 U.S. at 664, 666. As the dissent acknowledges, at-will removal authority is not the linchpin of the analysis; rather, an officer is inferior as long as he is "statutorily subject to direction and supervision in all significant activities." Dis. Op. at 48. Here every significant Board function is subject to significant Commission oversight. *See supra* pp. 9-10.

[5] Section 107(d)(3) provides that the Commission may remove a Board member upon finding that the member

> (A) has willfully violated any provision of this Act, the rules of the Board, or the securities laws; (B) has willfully abused the authority of that member; or (C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.

15 U.S.C. § 7217(d)(3).

"the fact that [Board members] can be removed by the [Commission] indicates that [they are] to some degree 'inferior' in rank and authority," 487 U.S. at 671.

The Supreme Court has expressly permitted legislatively-imposed limitations on executive officers' removal authority:

> We have no doubt that when congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as congress may enact in relation to the officers so appointed. The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto.

United States v. Perkins, 116 U.S. 483, 485 (1886). In *Myers v. United States*, 272 U.S. 52 (1926), the Court reaffirmed that "Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal," *id.* at 161, although not to the point of requiring Senate approval of removals, *id.* at 164; *see also Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

Moreover, the Fund can point to no case prescribing the ways in which Congress can restrict a principal officer's removal of his inferiors. The

opinion of the Justice Department's Office of Legal Counsel ("OLC"), 17 U.S. Op. Off. Legal Counsel 150, 156-57 (1993), relied on by the Fund, concluded only that "jointly" vesting removal authority in a cabinet secretary and the council whose members were themselves subject to removal could pose constitutional problems. Like the Attorney General in *Morrison* and the Judge Advocate General in *Edmond*, the Commission has sole removal authority under the Act. For purposes of this facial challenge, the arguably more restrictive for-cause removal cannot be dispositive because, as the district court concluded, the Commission could broadly interpret its removal authority in order to ensure that the Board conforms to its policies.

Finally, our dissenting colleague's two-part test for determining inferior officer status, Dis. Op. at 45-46, sets up a new paradigm in order to reach a desired result. Nothing in *Edmond* suggests that "direct[ion] and supervis[ion] *at some level*," 520 U.S. at 663 (emphasis added), necessitates "manag[ing] the ongoing conduct," Dis. Op. at 46, of every day-to-day function. Surely both the Coast Guard judges in *Edmond* and the Independent Counsel in *Morrison* would have failed such a narrow test. But even under the terms of this novel test, the Act survives scrutiny. Indeed, the Act commands that *all* of the Board's duties are "subject to action by the Commission." 15 U.S.C. § 7211(c). As in *Edmond*, any sanctions imposed by the Board are "subject to review by the [Commission] before the decisions t[ake] effect on the accused," Dis. Op. at 41; *see* 15 U.S.C. §§ 7215(c)(1), 7217(c)(2). Additionally, the Commission's broad authority under the Act contradicts the dissent's position that the Board's

decisions regarding "inspections, investigations, and enforcement actions" cannot be "prevent[ed][,] affirmatively command[ed], and manage[d]" by the Commission, Dis. Op. at 46. First, the Act requires the Board to inspect all registered public accounting firms in accordance with a predetermined schedule, 15 U.S.C. § 7214(b); the Board lacks discretion not to inspect a particular firm. Each inspection yields an inspection report, 15 U.S.C. § 7214(g), and each firm may seek Commission review of its inspection report, *id.* § 7214(h). Therefore, to the extent the inspection report forms the basis for a subsequent investigation by the Board, the Board's determination is subject to Commission approval. Second, although it has the power to do so, *see id.* § 7202(a), the Commission need not "affirmatively command" an investigation, Dis. Op. at 46, given that the Act preserves the Commission's own authority to take administrative or disciplinary action against a firm, 15 U.S.C. § 7202(c)(3). The fact that the Commission's investigative authority remains intact is consistent with the role of the Board as a specialized component of the Commission that exercises authority for purposes of efficiency and convenience but cannot usurp it. Third, and most important, because the Board must establish by rule "fair procedures for the investigation and disciplining" of accounting firms and individuals, *id.* § 7215(a), and "[n]o rule of the Board shall become effective without prior approval of the Commission," *id.* § 7217(b)(2), the Commission is empowered to modify the Board's investigative authority as it sees fit and may mandate that all decisions regarding investigation or enforcement actions against a firm be approved by the Commission. *See also id.* § 7271(d)(2). While the

Board may adjust the inspection schedule, it may do so only by rule, *id.* § 7214(b)(2), and all Board rules are subject to Commission approval. So too for the Board's investigative authority, *see id.* § 7215(b)(1). Certainly the Commission's authority to "promulgate such rules and regulations[] as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of th[e] Act," *id.* § 7202(a), provides ample room for the Commission to tighten its reins on the Board's investigative authority.[6] For purposes of this facial challenge, that the Commission has not chosen to take these steps does not mean that it lacks the authority to do so. If anything, it suggests that the Board has so far acted in accordance with Commission policy.

Because the Board's exercise of its powers under the Act is subject to comprehensive control by the Commission and Board members are accountable to and removable by the Commission, we hold that Board members are inferior officers.

B.

The Fund's alternative contention, assuming Board members are inferior officers, that the Commission is

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[6] In suggesting that the Commission is somehow limited by its statutory obligation to promulgate rules "in furtherance of this Act," Dis. Op. at 50, our dissenting colleague ignores that the Act's purpose in establishing the Board was "to protect the interests of investors and further the public interest," 15 U.S.C. § 7211(a), and therefore Congress contemplated that the goals of the Act and the public interest would go hand in hand. If the public interest demands increased micromanaging of Board operations, the Act empowers the Commission to respond accordingly.

not a department and the Commissioners are not the head of the Commission, is also unpersuasive.

1. As used in the Appointments Clause, the phrase "'Heads of Departments' . . . suggests that the Departments referred to are themselves in the Executive Branch or at least have some connection with that branch." *Buckley*, 424 U.S. at 127. The Supreme Court has explained that "Departments" refers to "the subdivision of the power of the Executive into departments, for the more convenient exercise of that power." *United States v. Germaine*, 99 U.S. 508, 510 (1878). In *Freytag*, the Supreme Court described Departments as being "*like* the Cabinet-level departments," 501 U.S. at 886 (emphasis added), which are "limited in number and easily identified," *id.* Although the Court did not identify the precise characteristics of "Cabinet-like" departments and reserved the issue of whether independent agencies are departments, *id.* at 887 n.4, four Justices urged that "Departments" should be understood to encompass "all agencies immediately below the President in the organizational structure of the Executive Branch," including "all independent executive establishments," *id.* at 918-19 (Scalia, J., joined by O'Connor, Kennedy, and Souter, JJ, concurring in part and in the judgment) (hereinafter "Concurring Op."). They reasoned that the Framers "chose the word 'Departmen[t]' . . . not to connote size or function (much less Cabinet status) but separate organization – a connotation that still endures even in colloquial usage today." *Id.* at 920. Noting that the Constitution makes no reference to the term "Cabinet," *id.* at 916-17, and that the Court has not held that "'the Heads of Departments' are Cabinet members," *id.* at 917, the concurring justices

observed that even the sparse history of the Appointments Clause included the 1792 Act creating a Post-Master General, who, while not a cabinet member, had power to appoint an assistant and deputies, *id.* As Congress has continued to empower non-Cabinet officers to appoint inferior officers, *id.* at 918, the concurring justices cautioned that to conclude such action violated the Appointments Clause would "cast[] into doubt the validity of many appointments and a number of explicit statutory authorizations to appoint," *id.*

The Commission is "Cabinet-like" because it exercises executive authority over a major aspect of government policy, and its principal officers are appointed by the President with the advice and consent of the Senate, 15 U.S.C. § 78d(a), and subject to removal by the President, *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988). Given the constitutionality of independent agencies, *see Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935), such entities must be able to constitutionally exercise appointment authority to permit their proper functioning. As the Attorney General opined in concluding that the Civil Service Commission was a "Department[]" under the Appointments Clause, the Commission here is "not a subordinate Commission attached to one of the so-called executive departments but is in itself an independent division of the Executive Branch of the Government with certain independent duties and functions." 37 U.S. Op. Att'y Gen. 227, 231 (1933). In 1996, the OLC further stated that Congress may "vest the power to appoint inferior officers in the heads of the so-called independent agencies." 20 Op. Off. Legal Counsel 124, 152 (1996). Congress has authorized the

Commission to appoint officers and employees, 5 U.S.C. § 4802(b), and it would be illogical to handicap its ability to effectuate its statutory mandate because of the very independence that Congress has deemed necessary and the Supreme Court has deemed constitutional.

2. The Commissioners as a group exercise the same final authority as is vested in a single head of an executive department. Congress has vested "the Commission" with rulemaking, investigative, and adjudicatory authority. *See, e.g.*, 15 U.S.C. § 7202. Just as independent agencies are "Departments" capable of receiving appointment powers even though they are structured to give the President less control over their functioning, *see Freytag*, 501 U.S. at 919 (Concurring Op.), the heads of independent agencies need not be wholly controlled by the President as long as they are principal officers appointed (with the advice and consent of the Senate) and removable by the President. All three branches of government are in agreement that the head of an agency can be a multi-member body. The Attorney General's opinion in 1933 acknowledged that the Civil Service Commission is "headed by" its commissioners. 37 U.S. Op. Att'y Gen. at 228. Congress enacted the Reorganization Act of 1949, 5 U.S.C. § 904, providing that a Presidential plan for Congressional approval can "provide that the head of an agency be an individual or a commission or board with more than one member." The Ninth Circuit held in *Silver v. United States Postal Service*, 951 F.2d 1033 (9th Cir. 1991), that the nine governors of the Postal Service constituted its "Head[]," concluding that "[t]he fact that the Postal Service is not structured like a traditional government agency need not imply that

its structure is not constitutionally permissible," *id.* at 1037, and that as to appointment, removal and decisionmaking, "Congress carefully vested ultimate control and authority of the Postal Service in the Governors," *id.* at 1038. The same is true here. Congress, in the Act as well as the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, vested authority in "the Commission" to promulgate rules, initiate investigations, sue to enjoin violations of securities laws, review disciplinary sanctions, appoint Board members, approve Board rules and the Board's budget, and censure and remove Board members.

The historical sources relied on by the Fund regarding the "benefits of lodging the appointment power in a single individual," Appellants' Br. at 39 (citing THE FEDERALIST No. 76 and 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1522 (1833)), address a different question, namely the decision to vest appointment of principal officers in the President, and the Framers entrenched that preference in Article II, § 2, cl. 2. The Fund has pointed to no authority wherein the Framers foreclosed Congress from granting multimember commissions authority to appoint inferior officers. The dictionary is of no assistance because a definition of a "head" as "one who has the first rank or place," Appellants' Br. at 39-40 (quoting NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)), does not resolve whether the "one" must be one person rather than one committee.

Finally, in urging that the Chairman of the Commission is its "Head[]" and therefore the Act's grant of Commission appointment power is invalid,

the Fund's authorities do not support its conclusion. While the Postmaster General in *Silver* was an inferior officer appointed and removable by the nine governors, *see* 951 F.2d at 1040, the Chairman is not inferior to the Commission but rather is simply one commissioner who has additional administrative functions. Just as the Chairman has no power to remove another commissioner, the Commission as a whole may neither appoint nor remove one of its own. Moreover, the Reorganization Act addressed in *Silver* mandated that the head of an agency be either a civil service position or subject to Presidential appointment with the advice and consent of the Senate, 5 U.S.C. § 904; the Chairman is neither, as the President alone selects a Chairman from among the Commissioners. Reorganization Plan No. 10, § 3, 64 Stat. 1265, 1266 (1950). Additionally, although the Chairman has authority to appoint and supervise personnel pursuant to Reorganization Plan No. 10 of 1950, the Chairman does not have sole appointment authority under the Plan; rather "[t]he appointment by the Chairman of the heads of major administrative units under the Commission shall be subject to the approval of the Commission." Reorganization Plan No. 10, § 1(b)(2), 64 Stat. at 1266 (1950); *see United States v. Hartwell*, 73 U.S. (6 Wall) 385, 393-34 (1867); *Nat'l Treasury Employees Union v. Reagan*, 663 F.2d 239, 246 n.9 (D.C. Cir. 1981).

Because Board members are inferior officers of the Commission, which is a "Department[]" whose "Head[]" consists of the several Commissioners, we hold that Title I of the Act creating the Board does not violate the Appointments Clause.

IV.

Although not expressly included in the Constitution itself, the principle of separation of powers is implicit in the first three articles of the Constitution that define separate roles for the legislative, executive, and judicial branches. *See Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co.*, 337 U.S. 582, 591 (1949); *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880).[7] Considered a bulwark of a just government, *see* THE FEDERALIST No. 47 (James Madison), this principle, however, "by no means contemplates total separation of each of these three essential branches of Government," *Buckley*, 424 U.S. at 121. The Fund does not assert that Congress or the judiciary have directly encroached on the Executive Branch's appointment, removal, or decisionmaking authority by aggrandizing their own powers. Instead, the Fund's separation of powers challenge is premised on the contention that the Act constitutes an excessive attenuation of Presidential control over the Board. The crux of the Fund's challenge – that the double for-cause limitation on removal makes it impossible for the President to perform his duties – is a question of first impression as neither the Supreme Court nor this court has considered a situation where a restriction on removal passes through two levels of control. But the Fund's categorical, bright-line approach conflicts with the

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[7] This principle has been more recently reaffirmed by the Supreme Court in a series of opinions interpreting the President's Article II powers. *See Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

Supreme Court's case-specific reasoning in *Morrison*, which emphasized that there are "several means of supervising or controlling [Presidential] powers," 487 U.S. at 696. The removal power thus does not operate in a vacuum; rather it is one of several criteria relevant to assessing limits on the President's ability to exercise Executive power.

A.

The Supreme Court has long recognized that some types of restrictions on Presidential authority within the Executive Branch are permissible, especially in the case of independent agencies. In *Humphrey's Executor*, the Supreme Court rejected a challenge to the constitutionality of independent agencies in which principal officers were "subject to removal by the President for inefficiency, neglect of duty, or malfeasance in office," rather than at the President's will. 295 U.S. at 623. The Court observed that "to hold that . . . the members of the [Federal Trade Commission] continue in office at the mere will of the President," *id.* at 626, would thwart Congress's intention that the commission be "nonpartisan" and "independent of executive authority," *id.* at 624-25 (internal quotation marks omitted).

Several decades later, the Supreme Court expanded upon its analysis in *Humphrey's Executor*, concluding that the statute establishing the Independent Counsel did not violate the principle of separation of powers. The Court considered the "two related issues" of restrictions on the President's power to remove and the impact of the Ethics in Government Act as a whole in order to address the "real question" of "whether . . . the President's ability to perform his constitutional duty," *Morrison*, 487

U.S. at 691, to "take Care that the Laws be faithfully executed," U.S. CONST., art. II, § 3, was impeded. Noting the Attorney General's powers to request appointment of the Independent Counsel and to remove her for cause alongside her limited jurisdiction and tenure and lack of policymaking authority, *id.* at 691-92, the Court held that restrictions on the "amount of control or supervision," *id.* at 695, that the President ultimately exercised over the functions of the Independent Counsel were constitutional given the "several means of supervising or controlling the . . . powers that may be wielded," *id.* at 696.

B.

As an initial matter, independent agencies such as the Commission by definition enjoy a degree of autonomy in conducting their affairs, including staffing and operations. Yet this independence is not without limits. In addition to the ability to appoint Commissioners, 15 U.S.C. § 78d(a), and remove them for cause, *see Blinder*, 855 F.2d at 681; *see also Wiener v. United States*, 357 U.S. 349 (1958), which removal power the Supreme Court has interpreted broadly,[8] the President possesses significant additional levers of influence. Most obviously, by appointment of the Commission chairman, who serves at the pleasure of the President and often "dominate[s] commission policymaking," the

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[8] The Supreme Court has held that the restrictions on the President's removal of Commissioners for "inefficiency, neglect of duty, or malfeasance in office" are "very broad and . . . could sustain removal . . . for any number of actual or perceived transgressions." *Bowsher*, 478 U.S. at 729.

President can influence Commission policy and control who directs "the administrative side of commission business, select[s] most staff, set[s] budgetary policy, and as a consequence command[s] staff loyalties." Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 591 (1984) (citing DAVID M. WELBORN, GOVERNANCE OF FEDERAL REGULATORY AGENCIES (1977)). "Here the White House connection is often less direct and generally more subtle, but consultation and coordination on general policy issues of national interest naturally occurs." *Id.* (footnotes omitted). Additionally, although statutory as well as political constraints may prevent Presidential dominance in specific decisions, the President is not stripped of overall influence because independent agencies generally require "presidential good will" to obtain budgetary and legislative support, *id.* at 594-95. Various administrative tools provide additional influence to the President; these include centralization of contracting, personnel requirements, and property allocations. *Id.* at 587. "[A]ny assumption that executive agencies and independent regulatory commissions differ significantly or systematically in function, internal or external procedures, or relationships with the rest of government is misplaced." *Id.* at 596.

In turn, the Commission enjoys both appointment and removal powers over Board members and, most significantly, "Congress has provided sweeping mechanisms to guarantee substantive control by the [Commission] of the Board's use of its powers under the Act." Intervenor's Br. for the United States at 49-50. The Board's status, as a heavily controlled

component of an independent agency, is fully congruent with the paradigm laid out in *Humphrey's Executor*.[9] No Board rule is promulgated and no Board sanction is imposed without the Commission's stamp of approval. Indeed, any policy decision made by the Board is subject to being overruled by the Commission. The Act also provides authority for the Commission to limit and to remove Board authority altogether. 15 U.S.C. §§ 7217(d)(1), (2). Additionally, the Act fully preserves the Commission's authority to regulate the accounting profession, set standards, and take any action against a company or individual. *Id.* § 7202(c). "Because the Commission can withdraw or preempt any aspect of the Board's substantive regulatory authority at any time to effectuate the Commission's own understanding of 'purposes of th[e] Act and the securities laws,' no functional concern or constitutional dimension should be raised by the 'good cause' restrictions on its ability to remove particular officers." Intervenor's Br. for the United States at 50 (quoting 15 U.S.C. § 7217(d)(1)). Thus the Act ensures that all Board functions are subject to pervasive Commission

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[9] Our dissenting colleague wholly misreads both the court's opinion and the Board's brief to suggest that the Board is itself an independent agency. Dis. Op. at 1,3, 30 n.9. Indeed, with that premise the dissent's conclusion that the Board's structure is unconstitutional conveniently follows. But repeatedly referring to the Board as an independent agency, *see, e.g., id.* at 23 & n.7, 24, 26, 30 n.9, 36, 43 & n.16, does not make it so. As explained in Part III above, by statutory design the Board is composed of inferior officers who are entirely subordinate to the Commission and whose powers are governed by the Commission.

control, including approval of its annual budget and supporting fees, 15 U.S.C. § 7219(b), (d).

When assessed in the context of the restrictions on Presidential power upheld in *Morrison*, the President's powers under the Act extend comfortably beyond the minimum required to "perform his constitutionally assigned duties," *Morrison*, 487 U.S. at 696. Although the President does not directly select or supervise the Board's members, the President possesses significant influence over the Commission, which in turn possesses comprehensive control over the Board. By contrast, neither the President nor the Attorney General had the power to appoint the Independent Counsel or the power to control her investigatory or prosecutorial authority. Instead, a three-judge court appointed the Independent Counsel, *Morrison*, 487 U.S. at 661 (citing 28 U.S.C. § 49 (1982 ed., Supp. V)), and defined her jurisdiction, *id.* Whereas the Board cannot appear in court without the Commission's permission, 15 U.S.C. § 7211(f)(1), the Independent Counsel's powers included "'initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling *all aspects of any case*, in the name of the United States,'" *Morrison*, 487 U.S. at 662 (quoting 28 U.S.C. 594(a)(9)) (emphasis added), and hiring staff to do so, *id.* (citing 28 U.S.C. 594(c)). Most importantly, while the Commission retains its full authority under the Act, 15 U.S.C. § 7202(c), the Ethics in Government Act divested the Attorney General of his pre-existing authority and invested it entirely in the Independent Counsel: "[W]henever a matter has been referred to an independent counsel under the [Ethics in Government] Act, the Attorney

General and the Justice Department are required to suspend all investigations and proceedings regarding the matter," *Morrison*, 487 U.S. at 662-63.[10] As designed by Congress, the Independent Counsel possessed significant independence from the President, but the Supreme Court found no separation of powers violation. The statutorily more constrained authority of the Board, when set beside the Independent Counsel's broad powers and independence, falls well within constitutional bounds.[11]

The Fund points to the limited tenure and jurisdiction of the Independent Counsel in *Morrison* as justification for the unchecked powers of the position, but neither the duration of the office nor its prescribed scope operated as significant constraints on the Independent Counsel's exercise of her broad powers. Although the Independent Counsel was a temporary position, neither the President, the

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[10] Thus, the Independent Counsel "possessed core and largely unchecked federal prosecutorial powers, effectively displacing the Attorney General and the Justice Department within the counsel's court-defined jurisdiction, which was not necessarily limited to the specific matter that had prompted [her] appointment." 31 Op. Off. Legal Counsel, at *34 (Apr. 16, 2007).

[11] Even viewing *Morrison* as authorizing a "significant intrusion" on the Executive power, Dis. Op. at 21, because the Board is subject to much greater Executive control than the Independent Counsel, the Board would withstand constitutional scrutiny if the Independent Counsel had not. The "sky is falling" approach to the Board's separation of powers implications is an exaggerated response to a relatively insignificant innovation. *Morrison* was the proverbial mountain; the present case, by comparison, is a molehill.

Attorney General, nor even the statute itself limited the length of her tenure; rather, the Independent Counsel determined when her statutory duties were complete, *id.* at 664. The Independent Counsel's time in office, thus, was "rather indefinite and expected to last for multiple years." 31 Op. Off. Legal Counsel, at *34 (Apr. 16, 2007). Moreover, the Independent Counsel's powers were arguably less delimited than the Board's insofar as she could request expansion of her prosecutorial jurisdiction. *See Morrison*, 487 U.S. at 667;28 U.S.C. § 593(c). Not only is the Board subject to statutorily-defined jurisdictional boundaries, but also the Commission is empowered to further limit the Board's functions, 15 U.S.C. § 7217(d)(2). To the extent the Fund maintains that the breadth of the Independent Counsel's powers was justified by exceptional circumstances, the circumstances leading to the enactment of the Independent Counsel statute are far from unique; as in the case of the Board, Congress identified the need for an entity within the Executive Branch and determined that some limitations on Presidential power were advisable. *See supra* n.1.

More directly, the Act's attenuation of the President's removal power of Board members does not mean, as the Fund contends, that the President's ability to carry out his Executive responsibility is therefore unconstitutionally restricted. Although the principal officer in *Morrison* - the Attorney General – served at the pleasure of the President, nothing in *Morrison* suggests that Congress cannot restrict removal of inferior officers in independent agencies

as well as executive agencies.[12] The Supreme Court instead underscored that the animating concern of the Court's removal-power cases is not formal but functional:

> The analysis . . . is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II.

487 U.S. at 689-90. The Court stated that, as regards an inferior officer, "we cannot say that the imposition of a 'good cause' standard for removal by itself unduly trammels on executive authority." *Id.* at 691. So too here, the President is not, as the Fund contends, "completely stripped" of his ability to remove Board members: Like-minded Commissioners can be appointed by the President and they can be removed by the President for cause, and Board members can be appointed and removed for cause by the Commissioners. Although the level of Presidential control over the Board reflects Congress's intention to insulate the Board from partisan forces, this statutory scheme preserves sufficient Executive influence over the Board through the Commission so

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[12] Our dissenting colleague's assertion that *Morrison* "all but resolves the removal issue in this case" so as to "require[] invalidation of the [Board]," Dis. Op. at 25-26, is remarkable in light of the fact that in *Morrison* the Supreme Court did not purport to establish what removal restrictions would "completely strip[]" the President of removal authority, 487 U.S. at 692.

as not to render the President unable to perform his constitutional duties.[13]

Our dissenting colleague asks why the Board is removable only for cause, Dis. Op. at 51, concluding that it is to preserve the Board's independence of the Commission. But for-cause removal is not the end of the constitutional inquiry. We might ask in return, why has Congress granted such pervasive Commission authority over the Board if not to preserve the means of Executive control? Indeed, why would Congress deny the Commission at-will removal authority on the one hand and then provide the Commission with the authority to abolish Board powers on the other, essentially granting at-will removal power over Board functions if not Board members? Certainly the latter power blunts the

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[13] The Fund's suggestion that the Board's creation represents an effective diminution of Executive Branch power or an unprecedented Congressional innovation is also unavailing. The Commission's wide-ranging oversight over the Board was modeled after the rules regarding Commission authority over self-regulatory organizations ("SROs") in the securities industry, which have existed for over seventy years, *NASD*, 431 F.3d at 804, such as the New York Stock Exchange and the National Association of Securities Dealers, 15 U.S.C. § 7217(a); S. Rep. No. 107-205, at 12. A main difference – Board members are appointed by the Commission, whereas the government plays no formal role in the selection of SRO board members – means that the Board's grant of governmental authority is duly accompanied by government accountability. Consequently, the Fund's characterization of the Commission's review of Board action as "highly deferential," "severely restricted," and "severely circumscribed," Appellants' Br. 7, 33, 34, is difficult to reconcile with the Act, much less with this court's analysis of the same statutory review provisions for SROs in *NASD*, 431 F.3d at 806.

constitutional impact of for-cause removal. Even if these statutory provisions may reveal a legislative compromise, the Act as a whole provides ample Executive control over the Board. If, as the dissent posits, the for-cause removal provision reflects Congress's intention to grant "some degree of substantive independence" to the Board, *id.* at 34, that independence is undercut by the vast degree of Commission control at every significant step. To the extent the dissent offers that the Commission cannot have broad rulemaking authority to circumscribe the Board's investigative actions because "such authority would all but destroy the 'independence'" that the for-cause removal provision might otherwise allow, *id.* at 49; *see id.* at 34-35 (citing legislative history), such is the statute as written by Congress.

The Fund's contention that the Act violates separation of powers because the removal restrictions go beyond the "good cause" standard approved in *Morrison* fares no better. The Fund contends that under the Act "the [Commission] cannot remove a Board member who incompetently pursues wrong-headed policies, but permits, at most, removal only of those members who egregiously and deliberately flout their duties or engage in serious misconduct." Appellants' Br. at 21. The Supreme Court has never specified that "good cause" is the greatest restriction Congress may impose on removal of inferior officers. In fact, the Court has broadly stated that Congress "may limit and restrict the power of removal as it deems best for the public interest." *Perkins*, 116 U.S. at 483. Furthermore, it is far from clear that the Commission would share the Fund's cramped interpretation of its removal authority. *Cf. supra* n.8. While the Fund points to the fact that two of the

three provisions that authorize removal of Board members refer to actions taken "willfully," *see supra* n. 5, the meaning of that word "is often being influenced by its context," *Spies v. United States*, 317 U.S. 492, 497 (1943), and the Fund points to no basis for assuming that the Commission would view 15 U.S.C. § 7217(d)(3) as necessarily defining the exclusive circumstances in which removal for "good cause" may be established, *see Bowsher*, 478 U.S. at 729; *cf. Wonsover v. SEC*, 205 F.3d 408, 413-14 (D.C. Cir. 2000).

V.

"[F]acial challenges are disfavored" precisely because they do not permit the Executive Branch to attempt to "implement[] [statutes] in a manner consonant with the Constitution," *Wash. State Grange*, 128 S. Ct. at 1191, and the Fund's challenge does not present the occasion for the court to announce a bright-line rule regarding removal restrictions.[14] Consistent with the court's duty to construe statutes to avoid constitutional infirmity, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986), there is no basis to conclude that the Commission's removal authority does not

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[14] Contrary to our dissenting colleague, Dis. Op. at 35-36 n.12, the fact that this is a facial challenge significantly affects the analysis, for the Fund bears a heavy burden to demonstrate that the Act unduly constrains the President's ability to see that the laws are faithfully executed in *all* circumstances and *cannot* be constitutionally applied, *see supra* p.6. In making that determination, the court must look at the extent of the Commission's authority under the Act, not to whether and how it has exercised that authority, *see* Dis. Op. at 51 n.23.

satisfy Article II requirements, *cf. Morrison*, 487 U.S. at 682. The Fund's focus on the removal limitations ignores the statutory context, which empowers the Commission not only to oversee all significant Board activities through *ex ante* controls and *ex post de novo* review but also to "withdraw or preempt any aspect of the Board's substantive regulatory authority," Intervenor's Br. for the United States at 50, thus mitigating concern regarding the scope of the removal restrictions. The Act additionally preserves all of the Commission's authority in the field while enhancing Executive control in an area previously left largely in private control. *See supra* n.13.

Nor does our dissenting colleague's philosophical approach undermine either the court's logic or view of the law. While the fundamental purposes of the Appointments Clause and the principle of separation of powers are undisputed, the constitutional question for this court requires that we take instruction from Supreme Court precedent as we find it and understand that the absence of a precise precedent is neither the end of the inquiry – the statutory scheme in *Morrison*, for example, was also novel – nor grounds for failing to address Congress' statutory scheme as it is written. Our dissenting colleague's analysis, cloaked in textualist garb, construes Supreme Court precedent to support his theory instead of acknowledging its limits; for example, the intrusion by Congress upon the President's removal authority in *Myers* is far removed from what is at issue here, and the Court's multi-factor analysis in *Edmond* does not fit the dissent's novel two-step paradigm. The absolutes that the dissent postulates – essentially, either the President must have at-will

removal power or Congress has acted unconstitutionally – are inconsistent with the Supreme Court's more nuanced approach in addressing limitations on the President's appointment authority and separation of powers. In the face of a comprehensive statutory scheme that provides exhaustive means of Executive control and oversight, the dissent misrepresents the Board as an independent agency with final Executive authority, *see supra* n.9, interprets the Commission's powers of oversight narrowly, *see* Dis. Op. at 48-51, 51 n.23, and the limitations attendant to for-cause removal broadly, *see id.* at 31-35, divorced from their statutory context in a manner to create constitutional problems where there are none; and misreads Supreme Court precedent to portend doom for the unitary Executive. But those fears have no statutory basis, for our dissenting colleague can cite to no instance in which the Board can make policy that the Commission cannot override.[15]

Given the constitutionality of independent agencies and the Commission's comprehensive control over the Board, the Fund cannot show that the statutory scheme so restricts the President's control over the Board as to violate separation of powers. The bulk of

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[15] To the extent our dissenting colleague asserts both that overturning the Act would have no impact on other independent agencies, Dis. Op. at 5-6, and that failing to overturn the Act would produce a parade of horribles were Congress to adopt a double-for-cause approach generally, *id.* at 28, again he ignores the statutory scheme in a singular focus on the removal power. If that is to be the Supreme Court's approach, then it must say so for its precedent is more nuanced and takes account of the statute as a whole.

the Fund's challenge to the Act was fought – and lost – over seventy years ago when the Supreme Court decided *Humphrey's Executor*. At that time, the Court concluded that the concept of a unitary Executive embodied in the Constitution does not require the President to have an alter ego (i.e., an official serving at the pleasure of the President and removable at will) within independent agencies. The Court reiterated the conclusion that neither for-cause removal nor substantial independent discretion eviscerates Executive control in *Morrison*. The key question the Supreme Court requires this court to answer is whether the Act so limits the President's ability to influence the Board as to render it unconstitutional. Because of the reality of the President's broad-ranging authority under the Act, the Fund's facial challenge fails.

Accordingly, we hold that the Fund's facial challenge to Title I of the Act fails to reveal violations of the Appointments Clause or separation of powers, and we affirm the grant of summary judgment to the Board and the United States.

KAVANAUGH, *Circuit Judge*, dissenting: This case raises fundamental questions about the scope of the President's constitutional power to appoint and remove officers in the Executive Branch. Article II begins: "The executive Power shall be vested in a President of the United States of America." Under Article II, the President possesses the sole power and responsibility to "take Care that the Laws be faithfully executed." To assist in his duties, the President has authority, within certain textual limits, to appoint and remove executive officers. *Myers v. United States*, 272 U.S. 52, 117 (1926). Disputes over the scope of the President's appointment and removal powers have arisen sporadically throughout American history. This latest chapter involving the Public Company Accounting Oversight Board is the most important separation-of-powers case regarding the President's appointment and removal powers to reach the courts in the last 20 years. *Cf. Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Buckley v. Valeo*, 424 1 (1976); *Humphrey's Executor v. United States*, 295 602 (1935); *Myers*, 272 U.S. 52.

The Public Company Accounting Oversight Board is an independent executive agency created by the Sarbanes-Oxley Act of 2002. The PCAOB is considered an "independent" agency because the five members of the PCAOB are removable only for cause, not at will. The PCAOB portrays itself as just another independent executive agency – like the FCC, the FTC, and the NLRB – that is permissible under the Supreme Court's 1935 decision in *Humphrey's Executor*. Plaintiffs, including a Nevada accounting firm regulated by the Board, strenuously disagree and challenge its constitutionality.

Plaintiffs object to the fact that members of the PCAOB are appointed by and removable for cause by another independent agency, the Securities and Exchange Commission, rather than by the President. They argue that this structure, an independent agency appointed by and removable only for cause by another independent agency: (i) interferes with the President's Article II authority to remove executive officers, and thereby exercise the executive power and take care that the laws be faithfully executed; and (ii) violates the specific terms of the Appointments Clause of Article II regarding the President's authority to appoint "principal officers" in the Executive Branch. Plaintiffs contend that "vesting government agencies with coercive power over the citizenry, and simultaneously depriving the citizenry of any ability to control or check those exercising such potentially tyrannical authority, is precisely the fundamental threat to the 'liberty and security of the governed' that separation of powers principles were designed to prevent." Plaintiffs' Br. at 10-11 (quoting *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991)).

On the removal issue, the majority opinion views this case as *Humphrey's Executor* redux. But this case is *Humphrey's Executor* squared. There is a world of difference between the legion of *Humphrey's Executor*-style agencies and the PCAOB: The heads of the *Humphrey's Executor* independent agencies are removable for cause *by the President*, whereas members of the PCAOB are removable for cause only *by another independent agency, the Securities and Exchange Commission*. The President's power to remove is critical to the President's power to control

the Executive Branch and perform his Article II responsibilities. Yet under this statute, the President is two levels of for-cause removal away from Board members, a previously unheard-of restriction on and attenuation of the President's authority over executive officers. This structure effectively eliminates any Presidential power to control the PCAOB, notwithstanding that the Board performs numerous regulatory and law-enforcement functions at the core of the executive power. So far as the parties, including the United States as intervenor, have been able to determine in the research reflected in their exhaustive and excellent briefs, never before in American history has there been an independent agency whose heads are appointed by and removable only for cause by another independent agency, rather than by the President or his alter ego.[1] But that is the case with PCAOB members, who are removable for cause only by the SEC – and it is undisputed that the SEC as an independent agency is not the President's alter ego. The PCAOB thus goes well beyond what historical practice and *Humphrey's Executor* authorize.

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[1] By the President's "alter ego," I mean the head of a department who is removable at will by the President, such as the Attorney General or the Secretary of the Treasury. The Supreme Court has recognized that when the head of a department appoints inferior officers in that department, the President technically exercises his removal authority over those inferior officers through his alter ego, the department head. *See Myers*, 272 U.S. at 133 (referring to "alter ego" of President); *Morrison*, 487 U.S. at 692 (describing Attorney General as President's alter ego for removal of inferior officer by Attorney General); *Ex parte Hennen*, 38 U.S. 230, 259-60 (1839).

The PCAOB's structure not only exceeds the boundaries of *Humphrey's Executor*; it also contravenes specific and critical language in the Supreme Court's 1988 decision in *Morrison v. Olson*. The Supreme Court allowed for-cause removal of the independent counsel in *Morrison* only because the President through his alter ego (the Attorney General) still retained the authority to remove the independent counsel. Therefore, the Court emphasized, *Morrison* was "not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws." 487 U.S. at 692. This *is* such a case. The President has no ability to remove the PCAOB members, either directly or through an alter ego.

The statute's violation of the Appointments Clause is also plain. Under Article II as interpreted in *Edmond v. United States*, 520 U.S. 651 (1997), the PCAOB members are principal officers who must be appointed by the President with the advice and consent of the Senate. They are not inferior officers because they are not "directed and supervised" by the SEC, *id.* at 663: The PCAOB members are not removable at will by the SEC; the SEC does not have statutory authority to remove them for failure to follow substantive SEC direction or supervision; and the SEC does not have statutory authority to prevent and affirmatively command, and to manage the ongoing conduct of, Board inspections, Board investigations, and Board enforcement actions. Moreover, as the statutory text demonstrates, the very purpose of this statute was precisely to create an accounting board that would operate with some

substantive independence from the SEC, not one that would be "directed and supervised" by the SEC. *See, e.g.*, 15 U.S.C. §§ 7211(c), 7214, 7215, 7217; *see also* S. Rep. No. 107-205, at 6 (2002) ("The successful operation of the Board depends upon its independence . . . ."); 148 CONG. REC. S6327, S6331 (daily ed. July 8, 2002) (statement of Sen. Sarbanes) ("[W]e need to establish this oversight board . . . to provide an extra guarantee of its independence . . . ."). Because PCAOB members are principal officers under the *Edmond* test, they must be appointed by the President with the advice and consent of the Senate. The Board members are appointed by the SEC alone; therefore, the statute violates the Appointments Clause as well.

The two constitutional flaws in the PCAOB statute are not matters of mere etiquette or protocol. By restricting the President's authority over the Board, the Act renders this Executive Branch agency unaccountable and divorced from Presidential control to a degree not previously countenanced in our constitutional structure. This was not inadvertent; Members of Congress designed the PCAOB to have "massive power, unchecked power." 148 CONG. REC. at S6334 (statement of Sen. Gramm). Our constitutional structure is premised, however, on the notion that such unaccountable power is inconsistent with individual liberty. "The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom." *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting); *see also Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or

more of the branches seek to transgress the separation of powers."). The Framers of our Constitution took great care to ensure that power in our system was separated into three Branches, not concentrated in the Legislative Branch; that there were checks and balances among the three Branches; and that one individual would be ultimately responsible and accountable for the exercise of executive power. The PCAOB contravenes those bedrock constitutional principles, as well as long-standing Supreme Court precedents, and it is therefore unconstitutional.

Although the constitutional violations here are serious, two points are important to bear in mind. First, finding the PCAOB unconstitutional would not itself call into question the many other independent agencies that dot Washington, D.C. The heads of those agencies are appointed by and removable for cause *by the President*, the precise structure that *Humphrey's Executor* upheld and that is conspicuously missing from the PCAOB statute. In other words, the PCAOB is uniquely structured, and a judicial holding invalidating it would be uniquely limited to the PCAOB. Second, and relatedly, the constitutional flaws here could be easily and quickly corrected. Congress could simply amend the statute to require, for example, that the PCAOB members, like the heads of other agencies, be appointed by the President with the advice and consent of the Senate and therefore be removable by the President. *Cf.* Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008) (creating new "independent" federal regulator of Fannie Mae and Freddie Mac appointed by President with advice and consent of Senate and removable for cause by

President). Alternatively, Congress could make the Board part of the SEC – directed, supervised, and removable at will by the Commission just like inferior officers in the SEC. In the meantime, however, the Board's structure violates the Constitution of the United States.

I

As the Supreme Court has indicated, it is always important in a case of this sort to begin with the constitutional text and the original understanding, which are essential to proper interpretation of our enduring Constitution. *See Clinton v. City of New York*, 524 U.S. 417, 438-40 (1998); *Edmond v. United States*, 520 U.S. 651, 658-64 (1997); *INS v. Chadha*, 462 U.S. 919, 945-59 (1983); *Buckley v. Valeo*, 424 U.S. 1, 118-37 (1976). The text and original understanding are particularly significant in this case: They properly inform our analysis of the Board's arguments for extending the Supreme Court's 1935 opinion in *Humphrey's Executor* to cover this novel agency structure. I therefore will discuss the text and original understanding at some length.

"If there is a principle in our Constitution . . . more sacred than another, it is that which separates the Legislative, Executive and Judicial powers." *Myers v. United States*, 272 U.S. 52, 116 (1926) (quoting 1 ANNALS OF CONGRESS 581 (Madison) (1789)). "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley*, 424 U.S. at 124. To protect individual liberty, the Framers did not adopt a parliamentary

system with a Prime Minister dependent on the Legislature but instead created a President independent from the Legislative Branch: The President is not selected by the Congress (except in the rare cases when no Presidential candidate wins a majority of the state electors' votes); the President's salary is protected against any congressional diminution; and the President's term in office is fixed, except in cases of impeachment by the House and conviction by two-thirds of the Senate for high crimes and misdemeanors.

Article II of the Constitution addresses the Presidency. Its first 15 words are definitive: "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1. Article II also grants the President the sole authority and duty to "take Care that the Laws be faithfully executed." *Id.* art. II, § 3. Under the text of our Constitution, a single President possesses the entirety of the "executive power" (whatever the scope of that power may be) and the entire authority to take care that the laws be faithfully executed.[2]

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[2] It is important to distinguish the question of who is responsible for exercising the executive power from the question of the scope of executive power. The fact that a single President is responsible and accountable for exercising the executive power does not mean that the scope of executive power is broad or narrow. *Cf., e.g.*, Neal Kumar Katyal, Hamdan v. Rumsfeld: *The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 69 n.16 (2006) ("The unitary executive theory merely means that truly executive power is concentrated in the President; the theory alone does not specify what counts as executive power in the first place.").

The Framers established a single President by design: A single head of the Executive Branch enhances efficiency and energy in the administration of the Government. And a single head furthers accountability by making one person responsible for *all* decisions made by and in the Executive Branch. As the Supreme Court has noted, the "insistence of the Framers upon unity in the Federal Executive – to ensure both vigor and accountability – is well known." *Printz v. United States*, 521 U.S. 898, 922 (1997); *see also* THE FEDERALIST NOS. 69, 70, 72, 76 (Hamilton); *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2332 (2001) ("The Presidency's unitary power structure, its visibility, and its 'personality' all render the office peculiarly apt to exercise power in ways that the public can identify and evaluate.").

Justice Breyer succinctly summarized the Constitution's provision for a single President: "Article II makes a single President responsible for the actions of the Executive Branch in much the same way that the entire Congress is responsible for the actions of the Legislative Branch, or the entire Judiciary for those of the Judicial Branch. . . . The Founders created this equivalence by consciously deciding to vest Executive authority in one person rather than several. They did so in order to focus, rather than to spread, Executive responsibility thereby facilitating accountability. . . . [T]hese constitutional objectives explain why a President, though able to delegate duties to others, cannot delegate ultimate responsibility or the active obligation to supervise that goes with it." *Clinton v.*

Jones, 520 U.S. 681, 712-13 (1997) (concurring in judgment).

Of course, "the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates." *Myers*, 272 U.S. at 117. It has been understood since the beginning of the Republic that "Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, *including the power of appointment and removal of executive officers* – a conclusion confirmed by his obligation to take care that the laws be faithfully executed." *Buckley*, 424 U.S. at 136 (quoting *Myers*, 272 U.S. at 163-64) (emphasis added).

Under Article II, the President thus necessarily possesses the power to *appoint* executive officers who exercise executive authority delegated by the President and who otherwise advise and assist the President. *See* U.S. CONST. art. II, § 2, cl. 2; *id.* art. II, § 2, cl. 1 (President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices"); *see also* Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 660-68 (1996). Reflecting the Framers' careful attention to checks and balances, the text of the Constitution constrains the President's appointment power in certain important respects. In particular, the Appointments Clause provides that the President may appoint the "principal" executive officers – a category that includes at least the heads of departments – only with the advice and consent of the Senate. *See* U.S. CONST. art. II, § 2, cl. 2. In other words, the President does not possess the

unilateral power to appoint the Secretary of Defense or Attorney General, for example, but can do so only with Senate concurrence. Senate approval helps prevent the Presidential appointment of "unfit characters." THE FEDERALIST NO. 76 (Hamilton). Because Senate confirmation of all executive officers could prove cumbersome, however, the Appointments Clause also provides that Congress may by law vest the appointment of "inferior" executive officers in the President alone or the heads of departments, without the need for Senate approval. U.S. CONST. art. II, § 2, cl. 2.

To help direct and supervise executive officers – and thereby to exercise the "executive Power" and "take Care that the Laws be faithfully executed" – the President possesses not just the power to appoint, but also the power to *remove* executive officers. "Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal." *Myers*, 272 U.S. at 132. The moment that the President "loses confidence in the intelligence, ability, judgment or loyalty of any one of them, he must have the power to remove him without delay." *Id.* at 134; *see also* THE FEDERALIST NO. 72 (Hamilton) (executive officers "ought to be considered as the assistants or deputies of the Chief Magistrate . . . and ought to be subject to his superintendence"). "The power to remove officers, we have recognized, is a powerful tool for control." *Edmond*, 520 U.S. at 664. The reason that the power to remove at will translates into the power to control is evident: "Once an officer is appointed, it is only the authority that can remove him, and not the authority

that appointed him, that he must fear and, in the performance of his functions, obey." *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (quoting *Synar v. United States*, 626 F. Supp. 1374, 1401 (D.D.C. 1986)). If the President were stripped of plenary removal power over, say, the Secretary of Defense or the Attorney General, then the President no longer could fully control and be accountable for the exercise of executive power, as the Constitution demands. In other words, if Congress could unduly limit the President's ability to remove executive officers, the result would be a fragmented, inefficient, and unaccountable Executive Branch that the President would lack power to fully direct and supervise.

Unlike the President's power to appoint, the President's power to remove officers in the Executive Branch is not limited by the text of the Constitution. And the subject of removing officers in the Executive Branch "was not discussed in the Constitutional Convention." *Myers*, 272 U.S. at 109-10.[3] The issue of removal of executive officers instead was first "presented early in the first session of the First Congress," during consideration of a bill establishing certain Executive Branch offices and providing that the officers would be subject to Senate confirmation and "removable by the President." *Id.* at 109, 111. "Then ensued what has been many times described

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[3] The Constitution provides that all executive and judicial officers of the Federal Government can be removed through the impeachment process, U.S. CONST. art. II, § 4, but that has never been understood to be the exclusive method for removing executive officers other than the President and Vice President. *See Shurtleff v. United States*, 189 U.S. 311, 317 (1903).

as one of the ablest constitutional debates which has taken place in Congress since the adoption of the Constitution." *Parsons v. United States*, 167 U.S. 324, 329 (1897). Representative James Madison of Virginia and others argued that Article II provided the President plenary power to remove executive officers, making the reference in the bill unnecessary and misleading surplusage. Madison and his allies "dwelt at length upon the necessity there was for construing Article II to give the President the sole power of removal in his responsibility for the conduct of the executive branch, and enforced this by emphasizing his duty expressly declared in the third section of the Article to 'take care that the laws be faithfully executed.'" *Myers*, 272 U.S. at 117 (quoting 1 ANNALS OF CONGRESS 496, 497 (Madison)). As Madison explained, "If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." *Id.* at 131 (quoting 1 ANNALS OF CONGRESS 499 (Madison)). Madison added: "Is the power of displacing an Executive power? I conceive that if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 ANNALS OF CONGRESS 463 (Madison). This Presidential removal power would preserve "that great principle of unity and responsibility in the Executive department." *Myers*, 272 U.S. at 131 (quoting 1 ANNALS OF CONGRESS 499 (Madison)).

The House ultimately concurred with Madison's understanding and deleted the bill's express reference to the manner of removing the officers so as not to imply that the President's removal power "might appear to be exercised by virtue of a legislative grant only." *Id.* at 112 (quoting 1 ANNALS OF CONGRESS 579). Congress passed the bill, and President Washington signed it into law. President Washington proceeded to assert and use the removal power throughout his Presidency in order to ensure his personal control over and direction of the Executive Branch. *See* Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1827-29 (2006).

Congress's decision – referred to as the "Decision of 1789" – "provides contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument." *Bowsher*, 478 U.S. at 723-24 (internal quotation marks omitted). As Chief Justice Marshall explained, the Decision of 1789 "has ever been considered as a full expression of the sense of the legislature on this important part of the American constitution." 5 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 200 (1807).

In short, the plain text and original understanding of Article II establish the broad scope of the President's appointment and removal powers. As a leading scholar of the Constitution's text has aptly observed, "What Article II *did* make emphatically clear from start to finish was that the president would be personally responsible for his branch." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 197 (2005).

II

With that grounding in the constitutional text and the First Congress's Decision of 1789, I turn to the Supreme Court's key precedents interpreting that text and to analysis of the questions presented in this case. In this Part II, I will address the removal power issue. In Part III, I will consider the Appointments Clause question.

A

As explained above, the constitutional text and the original understanding, including the Decision of 1789, established that the President possesses the power under Article II to remove officers of the Executive Branch at will. That original understanding became widely accepted during the first 60 years of the Nation. *See, e.g., Myers v. United States*, 272 U.S. 52, 149 (1926) ("[T]he construction given to the Constitution in 1789 . . . may now be considered as firmly and definitely settled, and there is good sense and practical utility in the construction.") (citing 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW, Lecture 14, at 310). Yet questions over the extent of the President's removal power did not end. The issue came to the fore in the wake of the Civil War and prompted the House of Representatives's impeachment of President Andrew Johnson in 1868. As part of a bitter struggle over Reconstruction, Congress enacted the Tenure of Office Act in 1867, 14 Stat. 430, ch. 154. That law prohibited the President from removing certain Executive Branch officers without the Senate's concurrence. President Johnson contended that the Act was unconstitutional; in defiance of the Act, he removed his Secretary of War

without Senate approval. The House of Representatives responded by impeaching President Johnson, which was followed by a narrow Senate acquittal. The contentious Johnson episode ended in a way that discouraged congressional restrictions on the President's removal power and helped preserve Presidential control over the Executive Branch. The Tenure of Office Act was itself repealed in 1887. The Johnson acquittal stands as one of the most important events in American history in maintaining the separation of powers ordained by the Constitution. *See* WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 215-16, 230-31, 250 (1992); *see also Raines v. Byrd*, 521 U.S. 811, 826-28 (1997).

A few decades later in 1897, the Supreme Court considered a case that arose when President Cleveland fired a holdover U.S. Attorney from the Harrison Administration. *See Parsons v. United States*, 167 U.S. 324 (1897). The relevant statute established a four-year term for U.S. Attorneys. A unanimous Court held that the law did not preclude the President from removing the U.S. Attorney at will, based largely on the constitutional backdrop that necessarily informed interpretation of the statute. The Court said the debates and opinions on the removal power from the Decision of 1789 onward showed a "continued and uninterrupted practice" of unlimited Presidential removal power. *Id.* at 340. "Considering the construction of the Constitution in this regard as given by the Congress of 1789, and having in mind the constant and uniform practice of the Government in harmony with such construction,"

the Court construed the act as "providing absolutely for the expiration of the term of office at the end of four years, and not as giving a term that shall last, at all events, for that time." *Id.* at 339. The Court accordingly held that recognition that the officials "were removable from office at pleasure was but a recognition of the construction thus almost universally adhered to and acquiesced in as to the power of the President to remove." *Id.*; *see also id.* at 330 ("[T]he decision of Congress in 1789, and the universal practice of the Government under it, had settled the question beyond any power of alteration.").

In *Myers v. United States*, the Supreme Court thoroughly addressed the scope of the President's removal power. *See* 272 U.S. 52 (1926). In an extraordinarily detailed opinion by Chief Justice Taft, who had previously served as President and had a keen understanding of the realities of Executive Branch governance, the Court reaffirmed the Decision of 1789 and agreed with President Johnson's view in 1868 that restrictions on the President's removal power were unconstitutional. *Id.* at 166-67. The dispute in *Myers* arose after President Wilson had removed a postmaster without Senate approval, in violation of an 1872 statute covering the Post Office Department. The postmaster sued. In upholding the President's removal authority and rejecting the postmaster's claim, the Court examined the text and history of Article II and outlined the broad reach of the President's appointment and removal powers:

> The vesting of the executive power in the President was essentially a grant of the power to execute the

> laws. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible.

Id. at 117. The *Myers* Court said that the President's power of removal over executive officers was "essential to the execution of the laws by him." *Id.* The Court added that the President's removal power extended to officers appointed by the President throughout the Executive Branch, including to officers who are charged with promulgating regulations or exercising "quasi-judicial" duties, such as "members of executive tribunals." *Id.* at 135. And the *Myers* Court made clear that Congress could play no role in the removal of executive officers.

Consistent with the constitutional text and the Decision of 1789, the holding of *Myers* continues to this day to prohibit any congressional involvement in the removal of executive officers. In its 1986 decision in *Bowsher v. Synar*, for example, the Court reaffirmed this precise holding. *See* 478 U.S. 714. The *Bowsher* Court held that Congress had impermissibly "intruded into the executive function" by preventing the President's removal of an executive officer (the Comptroller General as his duties were then defined) without congressional approval. *Id.* at 734. The

Court stated that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." *Id.* at 726.

B

If the removal issue in this case were decided based on the constitutional text, the prevailing understanding of that text at the time of drafting and ratification and during the First Congress, the historical practice and common understanding of that text during the first 146 years of our constitutional Government, and the leading Supreme Court decisions in *Myers* and *Parsons*, we would face an easy decision. The PCAOB would be flatly unconstitutional because the statute restricts the President's power to remove PCAOB members at will and thereby to direct and supervise the exercise of executive power and take care that the laws are faithfully executed.

It's not quite that easy, however. Any decision this Court makes in this area must recognize the central importance of the Supreme Court's 1935 decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). The Court there did not overrule the precise holding of *Myers* by allowing congressional involvement in removal of executive officers. But in tension with *Myers*, the Court did uphold congressionally imposed good-cause restrictions on the President's removal of certain executive officers. *Id.* at 631-32.[4] The case arose after a decision by

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[4] Some have questioned the persuasiveness of the constitutional distinction drawn in removal cases between (i) a statute

President Franklin Roosevelt, upon taking office in 1933, to ask for Humphrey's resignation from the

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generally requiring the President to meet good-cause standards to remove an officer as in *Humphrey's Executor* and (ii) a statute requiring congressional approval of particular removal decisions as in *Myers*. In both cases, the President's power to remove is restricted by an Act of Congress; the for-cause approach arguably just shows, as Madison warned, that Congress can "mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." THE FEDERALIST NO. 48 (Madison). The apparent theory behind the distinction is that (i) Congressional diminishment of Presidential authority is different from (ii) Congressional diminishment of Presidential authority *and* concurrent enhancement of its own authority. As Justice Kennedy has written for the Court, that theory is not an entirely accurate summary of separation of powers principles: "Even when a branch does not arrogate power to itself, moreover, the separation-of powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States*, 517 U.S. 748, 757 (1996); *see also Clinton v. Jones*, 520 U.S. 681, 701 (1997) (quoting this language from *Loving* with approval). And as Judge Silberman, writing for himself and Judge Williams, has recognized, the factual basis for the distinction is dubious: "If the President's authority is diminished . . . Congress' political power must necessarily increase vis-a-vis the President." *In re Sealed Case*, 838 F.2d 476, 508 (D.C. Cir. 1988), *rev'd sub nom. Morrison v. Olson*, 487 U.S. 654 (1988); *see also In re Sealed Case*, 829 F.2d 50, 65 n.3 (D.C. Cir. 1987) (Williams, J., concurring in part and dissenting in part) ("Power abhors a vacuum. Unhitching the Independent Counsel from the executive may make the office naturally prone to domination by the branch that represents its primary competitor."); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2271 n.93 (2001) ("As a practical matter, successful insulation of administration from the President – even if accomplished in the name of 'independence' – will tend to enhance Congress's own authority over the insulated activities.").

Federal Trade Commission. President Roosevelt wrote in a letter to Humphrey, who had been appointed by President Hoover: "I do not feel that your mind and my mind go along together on either the policies or the administering of" the FTC. *Id.* at 619. When Humphrey refused to resign, President Roosevelt fired him. Humphrey challenged the removal as a violation of the Federal Trade Commission Act, which provided that the President could remove commissioners during their statutory term of office only for "inefficiency, neglect of duty, or malfeasance in office." *Id.*

The Solicitor General defended President Roosevelt's decision on constitutional grounds by citing *Myers*. Yet the Court ruled for Humphrey. In an opinion by Justice Sutherland, the Court upheld the statutory limits on the President's removal power, allowing the FTC to be "a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government." *Id.* at 625-26 (emphasis omitted). The Court stated that the Constitution permitted Congress to establish independent agencies that "cannot in any proper sense be characterized as an arm or an eye of the executive." *Id.* at 628; *see also Wiener v. United States*, 357 U.S. 349, 355-56 (1958) (relying on *Humphrey's Executor* and upholding removal restrictions on members of War Claims Commission).[5]

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[5] "The rationale of *Wiener*, which is essentially that *Congress* must have implied a for-cause removal restriction when *the*

Humphrey's Executor thereby blessed Congress's creation of the so-called "independent" agencies where "at least one individual is appointed by the President to a full-time, fixed-term position with the advice and consent of the Senate and has protection against summary removal by some form of 'for cause' restriction on the President's authority." Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1114 (2000). Today, this collection of independent agencies is commonly understood to include, among many others, the CFTC, the FCC, the Federal Reserve, the FTC, FERC, the NLRB, and the SEC. As the cases and statutes illustrate, what makes an agency "independent" is the for-cause removal restriction that limits the President's ability to remove the heads of the agency – typically to cases of inefficiency, neglect of duty, or malfeasance in office. *See, e.g.*, 44 U.S.C. § 3502(5) (listing as "independent" for purposes of the Paperwork Reduction Act 16 particular agencies); Breger & Edles, *Established By Practice*, 52 ADMIN. L. REV. at 1114 n.6, app. at 1236-94 (cataloging "independent agencies").

Along the same lines as *Humphrey's Executor*, the Supreme Court's 1988 decision in *Morrison v. Olson* upheld a good-cause restriction on removal of an *inferior* executive officer by a head of department who was an alter ego of the President (that is, by a

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Court believes that the functions of the agency demand such tenure protection, 357 U.S. at 353-56, seems questionable." *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 168 n.115 (1996).

head of department removable at will by the President). *See* 487 U.S. 654. In particular, the Court upheld the independent counsel provisions of the Ethics in Government Act of 1978, including the restriction on the Attorney General's power to remove an inferior officer (the independent counsel) only for "good cause." *Id.* at 685. In the *Morrison* Court's view, because the President's alter ego (the Attorney General) retained the authority to remove the independent counsel for cause, the President's "power to remove" was not "completely stripped." *Id.* at 692. The for-cause removal provision of the statute therefore was deemed not to "unduly trammel[] on executive authority" any more than in *Humphrey's Executor*. *Id.* at 691. The Court thus found no constitutionally significant difference for purposes of *Humphrey's Executor* between (i) the President removing an executive officer for good cause and (ii) a Presidential alter ego such as the Attorney General removing an executive officer for good cause. *See also In re Sealed Case*, 838 F.2d 476, 528 n.30 (D.C. Cir. 1988) (R.B. Ginsburg, J., dissenting) (Attorney General "is the hand of the President in taking care that the laws of the United States . . . be faithfully executed.") (internal quotation marks omitted) (alteration in original), *rev'd sub nom. Morrison*, 487 U.S. 654.[6]

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[6] Like *Morrison*, the Court's short and unexplained 19th Century decision in *United States v. Perkins* also appeared to allow restrictions on removal of *inferior* officers by the head of an executive agency, at least where the agency was headed by a principal officer removable at will by the President (there, the Secretary of the Navy). *See* 116 U.S. 483 (1886). Assuming *Perkins* remains good law on the removability of inferior

By permitting a good-cause restriction on the removal of an executive officer by the President or the President's alter ego, there is no doubt that *Humphrey's Executor* and *Morrison* authorize a significant intrusion on the President's Article II authority to exercise the executive power and take care that the laws be faithfully executed. *See Morrison*, 487 U.S. at 695 ("It is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity."); *Humphrey's Executor*, 295 U.S. at 628 (independent agencies are not "an arm or an eye of the executive").

For that reason, those cases have long been criticized by many as inconsistent with the text of the Constitution, with the understanding of the text that largely prevailed from 1789 through 1935, and with prior precedents such as *Myers* and *Parsons*. *See, e.g.*, Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 93 ("*Humphrey's Executor*, as commentators have noted, is one of the more egregious opinions to be found on pages of the United States Supreme Court Reports."); *Morrison*, 487 U.S. at 733-34 (Scalia, J., dissenting) ("Today's decision. . . fails to explain why it is not true that – as the text of

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officers, *see generally* John F. Manning, *The Independent Counsel Statute: Reading "Good Cause" in Light of Article II*, 83 MINN. L. REV. 1285, 1332-33 n.167 (1999), it goes no further than *Morrison* in allowing restrictions on the President's removal of inferior executive officers. *See Morrison*, 487 U.S. at 689 n.27, 690 n.29.

the Constitution seems to require, as the Founders seemed to expect, and as our past cases have uniformly assumed – all purely executive power must be under the control of the President.").

But we cannot, need not, and do not re-litigate those two cases here. For this Court, those cases are binding precedents on the removal question. The question is whether the Sarbanes-Oxley Act's restriction on the President's removal power over the PCAOB is unconstitutional under *Humphrey's Executor* and *Morrison*. As I explain below, the PCAOB contravenes those precedents and violates the Constitution.

C

The removal issue in this case arises because, unlike in *Humphrey's Executor* and *Morrison*, neither the President nor a Presidential alter ego can remove the members of the PCAOB. Rather, the Board is removable only by the Securities and Exchange Commission, and only for cause. Put another way, the PCAOB is an independent agency appointed by and removable for cause by another independent agency.[7] This means that the President

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[7] As an independent agency whose Commissioners are considered removable by the President only for cause, the SEC (unlike the Attorney General in *Morrison*) is not the President's alter ego, a point not contested by the Board or the United States as intervenor. *See SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988); 44 U.S.C. § 3502(5). Some agencies are "specifically designed *not* to have the quality . . . of being subject to the exercise of political oversight and sharing the President's accountability to the people – namely, independent regulatory agencies such as the Federal Trade Commission and the Securities and Exchange Commission."

of the United States is *two* levels of for-cause removal away from the PCAOB, notwithstanding that the PCAOB performs numerous regulatory and law-enforcement functions at the heart of the executive power.

In 1935 and 1988, the Supreme Court found that the President retains at least some authority to remove for-cause executive officers and thus some degree of control over them. The Court further said that the President's power to remove either directly or through an alter ego was essential to the constitutionality of the for-cause removal statutes. *See Morrison*, 487 U.S. at 692. By contrast, the double for-cause removal provisions in the Sarbanes-Oxley Act completely strip the President's ability to remove PCAOB members, either directly or through an alter ego, and combine to eliminate any meaningful Presidential control over the PCAOB. As one commentator cogently stated, "defenders of the PCAOB's structure will have their work cut out for them in arguing that the Constitution allows the PCAOB's five members to be even more independent from the President than the members of federal independent agencies." Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 1056 (2005); *see also* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597 (1984) ("Whatever arrangements are made, one must

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Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 916 (1991) (Scalia, J., concurring in part) (internal quotation marks and alteration omitted).

remain able to characterize the President as the unitary, politically accountable head of all law-administration . . . .").

This case therefore presents what the majority opinion rightly labels a constitutional issue of first impression. The question is whether to extend *Humphrey's Executor* and *Morrison* to uphold the removal restrictions in this Act – in other words, to interpret those precedents to permit not just independent agencies whose heads are removable for cause *by the President or his alter ego*, but also independent agencies whose heads are removable for cause *only by other independent agencies*. I would not so stretch *Humphrey's Executor* and *Morrison*. Four points inform my conclusion.

First, the lengthy recitation of text, original understanding, history, and precedent above leads to the following principle: *Humphrey's Executor* and *Morrison* represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power. Therefore, given a choice between drawing the line at the holdings in *Humphrey's Executor* and *Morrison* or extending those cases to authorize novel structures such as the PCAOB that further attenuate the President's control over executive officers, we should opt for the former. We should resolve questions about the scope of those precedents in light of and in the direction of the constitutional text and constitutional history. *See Bowsher*, 478 U.S. at 724-26 & n.4; *cf. Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2571-72 (2007). In this case, that sensible principle dictates that we hold the line and not allow encroachments on the President's

removal power beyond what *Humphrey's Executor* and *Morrison* already permit.

Second, the Supreme Court in *Morrison* has already specifically required that the President or his alter ego possess authority to remove an executive officer protected by a for-cause removal provision:

> Nor do we think that the "good cause" removal provision at issue here impermissibly burdens the President's power to control or supervise the independent counsel, as an executive official, in the execution of his or her duties under the Act. *This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the "faithful execution" of the laws.* Rather, because the independent counsel may be terminated for "good cause," *the Executive, through the Attorney General*, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act.

Morrison, 487 U.S. at 692 (emphases added).

That language from *Morrison* all but resolves the removal issue in this case. No doubt recognizing that this passage from *Morrison* dooms its submission, the Board tries to dismiss it as "dicta." PCAOB Br. at 43. I think not: This discussion contains the *Morrison* Court's essential explanation for why the independent counsel statute's restriction on removal was permissible under *Humphrey's Executor*. If that language from *Morrison* has meaning – and the Court clearly indicated that it would – it requires invalidation of the PCAOB. Here, unlike in *Morrison*,

the "power to remove an executive official has been completely stripped from the President." 487 U.S. at 692.

Third, Justice Holmes reminded us that "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity. Neither the majority opinion nor the PCAOB nor the United States as intervenor has located any historical analogues for this novel structure. They have not identified any independent agency other than the PCAOB that is appointed by and removable only for cause by another independent agency. *Cf. Bowsher*, 478 U.S. at 725 n.4 ("Appellants have referred us to no independent agency whose members are removable by the Congress for certain causes short of impeachable offenses, as is the Comptroller General.").[8] The lack of precedent for the PCAOB

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[8] In all the laws enacted since 1789, it is always possible that Congress has created another structure like the PCAOB that exercises traditional executive functions and yet is two levels of for-cause removal away from the President – even though the research of the parties and the Court has not found such a needle in the haystack. Even if such an example were uncovered, this kind of "independent agency appointed by and removable for cause only by another independent agency" has been rare at best.

As the parties acknowledge, any civil service tenure-protected employees in independent agencies constitute no precedent for the PCAOB. First, consistent with the text of the Appointments Clause, the Article II removal precedents have focused on the President's control over "officers" – not "employees," who are "lesser functionaries" typically exercising ministerial duties.

counsels great restraint by the Judiciary before

Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976). And any civil servants in independent agencies are employees, not officers, because they do not exercise "significant authority pursuant to the laws of the United States." *Id.* at 126; *cf. In re Sealed Case*, 838 F.2d at 497 ("[C]ivil servants are not thought to be the President's policymakers."), *rev'd sub nom. Morrison*, 487 U.S. 654. Second, in any event, civil service laws recognize the authority of the President or agency head to exempt certain employees from tenure protection as necessary and appropriate. *See, e.g.*, 5 U.S.C. §§ 2302(a)(2)(B), 3301-02, 7511(b)(2); *cf. id.* § 4802 (giving SEC express authority to hire officers and employees without regard to civil service laws); *see also* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive in Historical Perspective*, 31 ADMIN. & REG. L. NEWS 5, 5-6 (2005).

Although the Board and the United States as intervenor did not point to them as a precedent, administrative law judges in the independent agencies are removable only for cause at the initiation of the agency that employs them and with approval of the Merit Systems Protection Board, *see* 5 U.S.C. § 7521, whose members in turn are removable only for cause by the President, *see id.* § 1202(d). But there are good reasons the Board and the United States did not cite ALJs as a precedent. First, an agency has the choice whether to use ALJs for hearings, *see* 5 U.S.C. 556(b); Congress has not imposed ALJs on the Executive Branch. Second, many ALJs are employees, not officers. *See Landry v. FDIC*, 204 F.3d 1125, 1132-34 (D.C. Cir. 2000) (ALJs in FDIC are employees because they possess only recommendatory powers that are subject to de novo review by agency). Third, ALJs perform only adjudicatory functions that are subject to review by agency officials, *see* 5 U.S.C. § 557(b), and that arguably would not be considered "central to the functioning of the Executive Branch" for purposes of the Article II removal precedents. *Morrison*, 487 U.S. at 691-92. Nothing in this dissenting opinion is intended to or would affect the status of employees in independent agencies who have congressionally mandated civil service tenure protection or the status of administrative law judges.

approving this additional incursion on the President's Article II powers.

Fourth, upholding the PCAOB here would green-light Congress to create a host of similar entities. Congress could thereby splinter executive power to a degree not previously permitted, in serious tension with Article II's conception of a single President who can control his subordinates and the exercise of executive power. Congress would have license to create a series of independent bipartisan boards appointed by independent agencies and removable only for cause by such independent agencies. Imagine an Energy Price Enforcement Board appointed by and removable only for cause by FERC, an Indecency Enforcement Board appointed by and removable only for cause by the FCC, a Mortgage Regulatory Board appointed by and removable only for cause by the Fed. All are permissible under the PCAOB's theory of the case. But in such a system, where is the President, in whom the Constitution vests the "executive power"?

In the past, when faced with novel creations of this sort, the Supreme Court has looked down the slippery slope – and has ordinarily refused to take even a few steps down the hill. As Justice Stevens stated for the Court in invalidating the structure of the Metropolitan Washington Airports Authority's Board of Review: "[T]he statutory scheme challenged today provides a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role. . . . Congress could, if this Board of Review were valid, use similar expedients . . . . As James Madison presciently observed, the legislature 'can with greater facility, mask under complicated

and indirect measures, the encroachments which it makes on the co-ordinate departments.' Heeding his warning that legislative 'power is of an encroaching nature,' we conclude that the Board of Review is an impermissible encroachment." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991) (quoting THE FEDERALIST NO. 48).

As demonstrated in *MWAA*, when presented with arguments for "the kind of practical accommodation between the Legislature and the Executive that should be permitted in a 'workable government,'" *id.* at 276, the Court has strictly adhered to the constitutional text and the limitations of *Myers* and *Humphrey's Executor* and flatly and forcefully said no to novel policy inventions and corresponding structures that contravene Article II. *See id.* at 276-77; *Bowsher*, 478 U.S. at 736; *Buckley v. Valeo*, 424 U.S. 1, 132, 138-39 (1976); *see also Clinton v. City of New York*, 524 U.S. 417, 438 (1998); *INS v. Chadha*, 462 U.S. 919, 945 (1983); *cf. Printz v. United States*, 521 U.S. 898, 922 (1997) (striking down Brady Act in part on separation of powers grounds because it effectively transferred President's law enforcement responsibility to state officials "who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove)"). We should do the same here, lest we give rise to a new "Fifth Branch" of the Federal Government. *Cf.* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573.

In sum, the Sarbanes-Oxley Act created an entity that is inconsistent with the text and history of Article II, that the *Humphrey's Executor* Court did not confront much less endorse, that *Morrison* expressly rejects, that is apparently unprecedented in our history, and that could well lead to serious additional encroachments on the President's removal authority. The PCAOB violates Article II.[9]

D

Underlying my conclusion that the PCAOB violates removal precedents is the premise that this *double* for-cause removal structure attenuates the President's control over the Board more than the typical *single* for-cause provision restricts the President's control over independent agencies (whose heads are removable for cause directly by the President). As explained above, text, history, precedent, and logic demonstrate that this premise is correct.

To be sure, some might argue that the President's Article II removal power over independent agencies is already so crippled by *Humphrey's Executor* and

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[9] The majority opinion seems to argue that the PCAOB is actually not an independent agency. *See* Maj. Op. at 23-24, 32-33. But that is the term that traditionally has been applied by the Supreme Court, the Congress, and the Executive Branch to agencies like the PCAOB whose heads are not removable at will. *See, e.g., Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 398 (1995); *Bowsher*, 478 U.S. at 724 n.4. The majority opinion can try to argue that this independent agency is constitutionally permissible under the Supreme Court's precedents. But its attempt to claim that the PCAOB is not even an independent agency defies long accepted terminology and does not account for the meaning and effect of for-cause removal restrictions.

Morrison that this statute does no further discernible damage. The problem with any such suggestion, however, is that the Supreme Court upheld the for-cause restrictions at issue in *Humphrey's Executor* and *Morrison* on the precise factual assumption that they still permit the President some limited degree of control over executive officers. The Court concluded that a single for-cause restriction did not unduly "interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." *Morrison*, 487 U.S. at 690. Importantly, the *Morrison* Court distinguished the situation there from a case (like this one) where the power to remove had been "completely stripped" from the President. *Id.* at 692. The double for-cause removal provision at issue here completely strips the President's removal power and, as *Morrison* anticipated, poses a greater restriction on the President's constitutional authority than a single for-cause provision.

From the other direction, rather than argue that the President's well of executive removal power is already drained by the single for-cause restriction allowed by *Humphrey's Executor* and *Morrison* (so what's the harm with two?), some alternatively might contend that the President's control over an independent agency is actually not significantly affected by a for-cause removal provision (so again, what's the harm with two?). The majority opinion seems to latch onto this theory, *see* Maj. Op. at 23-24, which posits that, notwithstanding two for-cause removal provisions, the President can control the SEC and the PCAOB just as well as the President can control, for example, the Secretary of State and

the U.S. Ambassador to Iraq. But that suggestion does not fully account for the text of for-cause statutes, the realities of Executive Branch decisionmaking, and the long-standing interpretations and understandings of Congresses, Presidents, and courts regarding independent agencies.

The for-cause removal restrictions attached to independent agencies typically prohibit removal except in cases of inefficiency, neglect of duty, or malfeasance. Those restrictions have significant impact both in law and in practice. *See Freytag v. Comm'r of Internal Revenue*, 501 868, 916 (1991) (Scalia, J., concurring in part) ("independent regulatory agencies such as the Federal Trade Commission and the Securities and Exchange Commission" are "specifically designed *not* to have the quality . . . of being subject to the exercise of political oversight and sharing the President's accountability to the people") (internal quotation marks and alteration omitted); *Mistretta v. United States*, 488 361, 411 (1989) (good-cause provisions "specifically crafted to prevent the President from exercising 'coercive influence' over independent agencies"). *Humphrey's Executor* and *Wiener* demonstrate, for example, that "for cause" removal requirements forbid dismissal by the President due to lack of trust in the administrator, *see* 295 at 625-26, differences in policy outlook, *id.*, or the mere desire to install administrators of the President's choosing, 357 U.S. at 356. In *Morrison*, the Court therefore took it as a given that "the degree of control exercised by the Executive Branch over an independent counsel is clearly diminished in relation to that exercised over other prosecutors, such as the United States

Attorneys, who are appointed by the President and subject to termination at will." 487 U.S. at 696 n.34; *see also Buckley*, 424 U.S. at 133 ("The Court in [*Humphrey's Executor*] carefully emphasized that . . . the members of such agencies were to be independent of the Executive in their day-to-day operations . . . ."); *Humphrey's Executor*, 295 U.S. at 628 (independent agencies "cannot in any proper sense be characterized as an arm or an eye of the executive").

Consistent with the plain language, precedents, and common interpretation of those for-cause provisions, Presidents, Congresses, and officials in independent agencies work under the real-world understanding that the heads of the "independent" agencies possess some degree of congressionally conferred substantive autonomy from the President (although exactly how much autonomy is not always clear). That understanding is why Congress continues to include for-cause removal restrictions when it wants to create an independent officer with some substantive autonomy – as it did yet again a few weeks ago. *See* Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008) (creating new "independent" federal regulator of Fannie Mae and Freddie Mac appointed by President with advice and consent of Senate and removable for cause by President). In short, the double for-cause removal restriction cannot be justified by a theory that for-cause removal restrictions have no real meaning and effect.[10]

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[10] There is some respected academic support for reading the text of the typical for-cause removal restrictions to be all but indistinguishable from removal at will. But that conclusion is

Notwithstanding that text, history, precedent, and logic show that for-cause removal provisions generally have significant effects, the Board persists in arguing that the second for-cause restriction at issue here – the restriction on the SEC's removal of the Board – does not meaningfully restrict the SEC's power over Board members. The suggestion is that Board members are no different from inferior officers in the SEC – like the SEC General Counsel – who are removable at will by the Commission. But the for-cause removal provision here (as elsewhere) carries real meaning. It ensures that the Board possesses some degree of substantive independence from the SEC: In particular, the SEC has no power to direct and supervise Board inspections, investigations, and

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not obvious as a matter of ordinary statutory interpretation, and it is not evident, therefore, that this approach would comfortably fall even within the scope of the constitutional avoidance doctrine. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2001). If there is a problem with the statutory for-cause removal restrictions on the President's removal of so-called independent agency heads – and many think there may be, *see, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 598 (1994) – the problem is likely because the for-cause statutes contravene constitutional principles, not because the relevant political and judicial actors have misinterpreted the statutes for seven decades to be more restrictive than their plain language actually requires and contemplates.

enforcement actions. And the SEC cannot remove the Board for failing to follow any attempted substantive direction by the SEC with respect to specific Board inspections, investigations, and enforcement decisions – a point the Board never disputes. As a result, the for-cause removal restriction establishes, just as the congressional sponsors intended, that the PCAOB has "an extra guarantee of its independence and its plenary authority to deal with this important situation." 148 CONG. REC. S6327, S6331 (daily ed. July 8, 2002) (statement of Sen. Sarbanes). The for-cause removal restriction ensures, in other words, that the PCAOB operates as a "strong independent board." *Cf. id.* at S6330 (statement of Sen. Sarbanes) ("Title I of the bill creates a strong independent board to oversee the auditors of public companies."); S. REP. NO. 107-205, at 2 (2002) (Act creates "a strong independent board"); *id.* at 6 ("The successful operation of the Board depends upon its independence . . . ."). The for-cause removal provision supplies the basis for the trenchant observation of one of the supporters of this legislation that the PCAOB has "massive power, unchecked power." 148 CONG. REC. at S6334 (statement of Sen. Gramm).[11]

The Board's argument for dismissing the impact of this second for-cause provision is particularly far-fetched in this case because the statutory restriction

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[11] I cite these legislative materials not to alter interpretation of the text, but to demonstrate that the text's design of the PCAOB as an independent agency whose heads are protected against removal except for cause was exactly consistent with the legislative reports and statements, contrary to the strained interpretation of the majority opinion. *Cf.* Maj. Op. at 25-34.

on the SEC's removal of the Board is far *more* stringent than the typical for-cause removal restriction. The Board is designed to be even more independent from the SEC when performing certain critical activities than, for example, the independent SEC is from the President. The statute permits removal only when a Board member has "willfully" broken the law, has "willfully abused" his or her authority, or "without reasonable justification or excuse" has "failed to enforce compliance." 15 U.S.C. § 7217(d)(3)(A)-(C). This is more restrictive removal language than the traditional for-cause language of inefficiency, neglect of duty, or malfeasance. This provision makes it even clearer that the SEC's substantive disagreements with the Board's decisions regarding specific inspections, investigations, or enforcement actions do not justify removal for cause – a critical point that the Board never contests and that badly undermines its argument for upholding the double for-cause removal restriction.[12]

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[12] The Board notes that this case involves a facial challenge. But that does not affect the analysis; this is not the kind of case where a statute might be applied constitutionally in some instances but not in others. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). Here, either the PCAOB is unconstitutionally structured, or it is not. The Board also invokes the doctrine of constitutional avoidance and seems to suggest interpreting the statute so as to minimize if not eliminate the provision restricting the SEC's removal of the Board. But the for-cause removal provision cannot legitimately be read entirely out of the statute; as a result, the doctrine of constitutional avoidance does not help the Board in analyzing the removal issue. *See DeBartolo Corp.*, 485 U.S. at 575.

The statutory language and history show, in short, that the effect and purpose of this statute was to wall off the PCAOB from comprehensive SEC control, not to make the PCAOB "an arm or an eye" of the SEC. *Cf. Humphrey's Executor*, 295 U.S. at 628. The Board's counter-factual, counter-textual argument ignores the double for-cause reality of this statutory scheme.

* * *

In sum, neither the President of the United States nor a Presidential alter ego possesses any power to remove PCAOB members for cause or otherwise. The unique and apparently unprecedented double for-cause removal statute – an independent agency whose heads are removable for cause only by another independent agency – overruns the boundaries set by Supreme Court precedents in *Humphrey's Executor* and *Morrison* with respect to congressional encroachment on Presidential removal authority. I would hold it unconstitutional as a violation of Article II because it impermissibly restricts the President's power to remove executive officers.[13]

III

The Accounting Board also violates the Appointments Clause of Article II of the Constitution.

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[13] The majority opinion claims that this dissent articulates a theory that the President "must have at-will removal power." Maj. Op. at 33. Obviously that is an inaccurate reading of this dissenting opinion. *Humphrey's Executor* and *Morrison* permit certain for-cause removal statutes. My argument on the removal issue is that the statute at issue here contravenes those two cases.

A

To reiterate, the Appointments Clause provides that the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2.

By its plain text, the Appointments Clause governs the appointment of all "Officers of the United States." The PCAOB does not dispute that its members are "officers" of the United States, rather than mere employees who are "lesser functionaries." *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976). This concession was sound: PCAOB members have extraordinarily broad power under the Sarbanes-Oxley Act of 2002 to, among other things, promulgate rules, initiate and conduct investigations and inspections, compel testimony, and impose sanctions. They plainly exercise "significant authority pursuant to the laws of the United States," and they therefore are officers who must "be appointed in the manner prescribed by" the Appointments Clause. *Id.* at 126; *see also Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 881 (1991).

As the plain text of Article II provides and as the Supreme Court has long recognized, the Constitution "for purposes of appointment very clearly divides all

its officers into two classes." *United States v. Germaine*, 99 U.S. 508, 509 (1879). The most important executive officers – the "principal officers," a term that includes at least the "heads of departments" – require nomination by the President and confirmation by the Senate. The Framers foresaw, however, that the advice-and-consent process "might be inconvenient" when "offices became numerous, and sudden removals necessary." *Id.* at 510. The Appointments Clause therefore says that Congress can provide for appointment of "inferior officers" *either* by Presidential nomination and Senate confirmation *or* "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art. II, § 2, cl. 2.

B

The Appointments Clause issue in this case turns on whether PCAOB members are "principal" or "inferior" officers as those terms are understood and have been explained in Supreme Court decisions. If the members of the PCAOB are principal rather than inferior officers, then the Board is an unconstitutional violation of the Appointments Clause because Board members are not appointed by the President with the advice and consent of the Senate, but instead are appointed by the SEC.

Unlike with respect to the removal issue, there are relatively few Supreme Court precedents on the "principal versus inferior" officer issue for Appointments Clause purposes. *See In re Sealed Case*, 838 F.2d 476, 481 (D.C. Cir. 1988) ("Two hundred years after the adoption of the United States Constitution the federal courts are, essentially for the first time, required to construe closely the

appointments clause of Article II."), *rev'd sub nom. Morrison v. Olson*, 487 U.S. 654 (1988); *see also* Note, *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914, 1916 (2007). The dearth of precedent is easily explained as a matter of text and history. When Congress provides that appointment to a specific office requires Presidential appointment with Senate confirmation, the "principal versus inferior" question is irrelevant because that appointment procedure is constitutionally permissible for both principal and inferior officers. For example, the heads of the independent agencies are all appointed by the President with the advice and consent of the Senate, so it does not matter whether the officers are considered principal or inferior. Moreover, in most situations where Congress historically has provided for appointment of an executive officer by the Head of a Department, it was clear that the officer was inferior to that principal officer – because Congress did not prevent the principal officer from removing that inferior officer at will. *See generally Ex parte Hennen*, 38 U.S. 230, 259-60 (1839).

The Supreme Court most recently and most thoroughly analyzed the distinction between principal and inferior officers in *Edmond v. United States*, 520 U.S. 651 (1997). In that case, service members challenged the affirmance of their court-martial convictions by the Coast Guard Court of Criminal Appeals, an intermediate Executive Branch judicial tribunal within the Department of Transportation. That Coast Guard Court reviewed decisions of courts-martial, and its decisions were reviewed by the U.S. Court of Appeals for the Armed

Forces. The service members argued among other things that the judges of the Coast Guard Court of Criminal Appeals were "principal officers." This created a constitutional problem, they contended, because the judges had been appointed by the Secretary of Transportation, not by the President with the advice and consent of the Senate. *See id.* at 655-56.

In an opinion by Justice Scalia for eight Justices, the Supreme Court rejected that argument. Acknowledging that previous cases had not "set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes," *id.* at 661, the Court stated that "the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior" other than the President who was nominated by the President and confirmed by the Senate. *Id.* at 662. But it is "not enough" to identify other officers "who formally maintain a higher rank, or possess responsibilities of a greater magnitude." *Id.* at 662-63. The Court succinctly stated the test for discerning the difference between the two: Inferior officers "are officers whose work is *directed and supervised* at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663 (emphasis added).

Applying the "directed and supervised" test to the Coast Guard Court of Criminal Appeals judges, the *Edmond* Court concluded that they were inferior officers. *See id.* at 666. The Court described two different ways the Coast Guard judges were "directed

and supervised." First, the Coast Guard judges were "directed and supervised" by the Coast Guard Judge Advocate General (who is ex officio the General Counsel of the Department of Transportation) because they were removable *at will* by the JAG, and "[t]he power to remove officers . . . is a powerful tool for control." *Id.* at 664 (citing *Bowsher v. Synar*, 478 U.S. 714, 727 (1986); *Myers v. United States*, 272 U.S. 52 (1926)). As the Court also noted, the JAG prescribed rules of procedure for the court. Second, the Coast Guard judges were "directed and supervised" by the Court of Appeals for the Armed Forces because, by statute, their judicial decisions were subject to review by the Court of Appeals before the decisions took effect on the accused. The Coast Guard judges thus had "no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id.* at 665.[14]

C

Edmond was a relatively easy case in which to apply the "directed and supervised" test: The officers were removable at will, and at-will removal has always been considered a powerful tool for control.

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[14] As *Edmond* reveals, the analysis of whether an officer is "directed and supervised" depends on the express language of the statutes governing the officer in question. The *Edmond* test does not contemplate discovery or factual inquiry into how things work in different agencies with different superiors and subordinates. The analysis thus does not turn on the vagaries of particular supervisory relationships or personalities that might result in different degrees of actual supervision and direction. Rather, the constitutional analysis focuses on the structure set up by the statutory text.

See id. at 664. And the case involved intermediate *adjudicatory* officers in the Executive Branch whose decisions were subject to review by a higher adjudicatory body before taking effect, not executive officers who performed more typical executive functions such as conducting investigations, taking enforcement actions, and otherwise executing laws passed by Congress.

The task in this case is to apply the *Edmond* "directed and supervised" test to traditional executive officers who perform quintessentially executive functions, such as conducting investigations and inspections, and bringing enforcement actions.

Edmond and the basic principles underlying Article II teach that the key initial question in determining whether an executive officer is inferior is whether the officer is removable at will. Removability at will carries with it the inherent power to direct and supervise: "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." *Bowsher*, 478 U.S. at 726 (quoting *Synar v. United States*, 626 F. Supp. 1374, 1401 (D.D.C. 1986)). Therefore, if an executive officer is removable at will and is not the head of a department, the officer ordinarily may be considered inferior for purposes of the Appointments Clause. And Congress in turn may provide for appointment by the President alone or by the head of the department, rather than

through Presidential appointment with Senate advice and consent.[15]

By contrast, an executive officer removable only for cause is ordinarily designed and understood to be free from significant substantive direction and supervision by superiors. Indeed, that's the whole point of for-cause removal. *See Humphrey's Executor v. United States*, 295 U.S. 602, 625-26 (1935); *cf. id.* at 629 ("[I]t is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."). Because the purpose and effect of for-cause removal are to give the officer some measure of substantive independence from direction and supervision, for-cause officers ordinarily are not "directed and supervised" for purposes of *Edmond*. Instead, they presumptively should be considered principal officers who must be appointed by the President with the advice and consent of the Senate (as are the heads of independent agencies other than the PCAOB). The key, therefore, to applying the *Edmond* test to a for-cause executive officer, therefore, is to appreciate that for-cause removal by its nature is generally

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[15] Whether removable-at-will executive officers are principal or inferior depends on their place in the Executive Branch organizational chart. The heads of departments have no superior other than the President; therefore, they are principal officers. By contrast, the remaining removable-at-will officers in the executive departments and agencies ultimately report not only to the President, but also to other superior officers in the Executive Branch chain of command. Therefore, they may properly be considered inferior officers.

inconsistent with the notion of being "directed and supervised" by a superior officer.[16]

To be sure, if a statute expressly provides that a for-cause officer could be removed for disobeying any direction or orders by a superior, that officer would be subject to direction and supervision via the removal power, much like at-will officers. But the vast majority of agency statutes do not specify that for-cause officers can be removed for such disagreement, no doubt because the point of allowing removal only for cause would not be clear in that situation. *Cf.* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2323 (2001) ("[A] for-cause removal provision would buy little substantive independence if the President, though unable to fire an official, could command or, if necessary, supplant his every decision.").

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[16] Presuming for-cause officers to be principal officers makes great sense when one considers the purposes of the Appointments Clause. Because for-cause officers are designed to be relatively immune from direction and supervision, it is all the more important at the front end to ensure full scrutiny of the officers' character and qualifications. The combination of Presidential nomination and Senate confirmation is the constitutionally preferred way to achieve that goal. *See* LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 4-8, at 684 (3d ed. 2000); *see also Freytag*, 501 U.S. at 884 ("The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people."). That, indeed, is how the system works for the independent agencies (other than the PCAOB) now in existence; their heads are appointed by the President with the advice and consent of the Senate.

As noted above, in finding the Coast Guard judges to be inferior officers, *Edmond* did not refer only to the fact that the Coast Guard judges were removable at will by the JAG. The Court also pointed out that the intermediate appellate adjudicatory body at issue in *Edmond* could not issue a final decision; instead, all of its decisions were subject to review and pre-approval by a superior court if requested by the accused or the JAG. The Court therefore stated that the officers in question had "no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." 520 U.S. at 665. Although *Edmond* involved at-will adjudicatory officers, it is logical to assume that even *for-cause* executive officers who perform traditional executive functions – investigations, enforcement actions, and the like – still might be considered "directed and supervised" if a superior other than the President has statutory authority to prevent and affirmatively command, and to manage the ongoing conduct of, all significant exercises of executive authority by the officer.[17]

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[17] The independent counsel in *Morrison* was considered an inferior officer even though removable only for cause. But as the Court in *Edmond* stated: "*Morrison* did not purport to set forth a definitive test for whether an office is 'inferior' under the Appointments Clause. To the contrary, it explicitly stated: 'We need not attempt here to decide exactly where the line falls between the two types of officers . . . .'" 520 U.S. at 661-62 (quoting *Morrison*, 487 U.S. at 671). The critical facts that explain *Morrison* – and that also make it an unusual case on the inferior officer issue – are that the office was *temporary* and the counsel's duties and jurisdiction were considered limited. The temporary nature of the office is the same reason that *acting* heads of departments are permitted to exercise authority

Therefore, an officer removable only for cause is ordinarily not "directed and supervised" for purposes of *Edmond*, at least unless (1) the statute expressly provides that the officer can be removed for failing to follow a supervisor's direction and supervision, or (2) the statute expressly provides that a superior officer other than the President has authority to prevent and affirmatively command, and to manage the ongoing conduct of, all of the officer's exercises of executive authority against the public (such as conducting investigations and taking enforcement actions).

D

Applying the *Edmond* analysis to this case, PCAOB members are principal officers.

To begin with, unlike the judges at issue in *Edmond*, PCAOB members are not removable *at will*.

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without Senate confirmation. *See United States v. Eaton*, 169 U.S. 331, 343 (1898) ("Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official."); *see also Designation of Acting Dir. of the Off. of Mgmt. & Budget*, Op. Off. Legal Counsel at 3-4 (2003). Had the independent counsel been a *permanent* office for investigation and prosecution of crimes by high-level executive officers, and had the statute included the same for-cause removal restriction, it seems evident that the counsel would have been considered by the *Morrison* Court to be a principal officer requiring appointment by the President with the advice and consent of the Senate. In any event, for offices that are not temporary, the later decision in *Edmond*, not *Morrison*, controls the inferior officer Appointments Clause analysis: *Edmond*, unlike *Morrison*, did expressly purport to set forth a definitive test for inferior officer status governing future cases such as this one.

The SEC can remove PCAOB members only for cause.

Nor does the statute satisfy the conditions under which a for-cause officer can still qualify as inferior. The statute's for-cause removal provision does not allow the SEC to remove PCAOB members for failure to follow SEC direction and supervision. And the statute does not provide that the SEC can prevent and affirmatively command, and manage the ongoing conduct of, all PCAOB functions – most importantly, inspections, investigations, and enforcement actions.

In that regard, it again bears mention that the whole point of this statute – as evidenced in the statutory text and history – was to create an Accounting Board that would not be part of the SEC and not be subject to direction and supervision by the SEC with respect to Board inspections, investigations, and enforcement actions.[18] Rather, the text of the Sarbanes-Oxley Act reflects the deliberate legislative choice to create an independent entity protected by for-cause removal from SEC interference. As the statutory text repeatedly shows, Congress did not want the PCAOB to have "here-and-

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[18] The House overwhelmingly voted for a bill sponsored by Representative Oxley that would have authorized an accounting oversight entity *within the SEC*. *See* H.R. 3763, 107th Cong. § 2(b) (2002). But the Senate passed Senator Sarbanes's proposed bill, which provided for the creation of a new oversight board protected from SEC interference by means of for-cause removal provisions. *See* S. 2673, 107th Cong. § 107 (2002). The Conference Committee effectively preserved the relevant portions of the Senate bill. *See* H.R. REP. NO. 107-610, at 24 (2002) (Conf. Rep.).

now subservience" to the SEC. *Bowsher*, 478 U.S. at 727 n.5.

E

The Board nonetheless cites a scattershot of authorities that, it suggests, show that the Board is "directed and supervised" by the SEC and that Board members therefore are inferior officers. But those arguments are all unavailing. The key is this: None of the cited authorities gives the SEC power to prevent and affirmatively command, and to manage the ongoing conduct of, Board inspections, investigations, and enforcement actions.

First, the Board contends that after-the-fact review of Board *sanctions* by the SEC suffices to show that the SEC directs and supervises the Board with respect to its inspections, investigations, and enforcement actions. That makes little sense. One would not say, for example, that a U.S. Attorney is directed and supervised by a federal district court in his or her investigative decisions just because a court ultimately would have an opportunity to review any indictment or subpoena challenge. So too here. After-the-fact judicial or quasi-judicial review of enforcement decisions following an investigation does not remotely equate to direction and supervision for purposes of *Edmond*.

Second, the Board argues that the SEC has power to review Board *rules* before they take effect. That is true – and if the Board's sole statutory power were rulemaking, then it might be reasonable to conclude that the Board was "directed and supervised" for purposes of *Edmond*. But the problem with this argument is that the Board also has power to conduct inspections, investigations, and enforcement actions

without SEC direction and supervision. Being directed and supervised in only one slice of an officer's portfolio does not render the officer inferior if the officer is not directed and supervised in other significant activities. To qualify as inferior, an officer must be statutorily subject to direction and supervision in all significant activities.

Third, the Board points out that the SEC, in certain circumstances, can exercise, take over, or limit some investigative and enforcement responsibilities assigned to the Board if the SEC chooses to do so (after on-the-record hearings). *See* 15 U.S.C. §§ 7217(d)(1)-(2). But the SEC's exercising, taking over, or limiting the Board's responsibilities does not amount to directing and supervising the PCAOB. For example, Congress can alter the jurisdiction of particular federal courts, but that does not make judges inferior to Congress, or "directed and supervised" by Congress. Congress may switch regulatory authority from one agency to another, but that does not make the initial agency "directed and supervised" by Congress. Again, the critical point is this: The SEC's theoretical power to alter the Board's jurisdiction does not equate to power to prevent and affirmatively command, and to manage the ongoing conduct of, Board inspections, Board investigations, and Board enforcement actions.[19]

Fourth and finally, the Board seems to argue – albeit only in one oblique single-sentence footnote –

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[19] The SEC also has the power to "censure" the Board. § 7217(d)(2). But this has no more substantive impact than a critical press release, and thus is not relevant to the "directed and supervised" question.

that the SEC actually has statutory authority to issue rules by which the SEC could give itself power to direct and supervise all Board inspections, investigations, and enforcement actions. *See* PCAOB Br. at 26 n.3. There is a reason this bootstrapping argument appears in the Board's brief only in a single-sentence footnote. It is incorrect. The statute does not give the SEC that kind of authority; indeed, such authority would all but destroy the independence that the statutory text mandates and that Congress sought to ensure the Board would possess. Section 7211 states that the Board operates "subject to action by the Commission under section 7217." 15 U.S.C. § 7211(c); *see also* § 7211(f). Section 7217 in turn gives the SEC power to review only Board *rules* before they take effect. But § 7217 does not give the SEC power to direct or supervise Board *inspections*,[20] *investigations*,[21] *and enforcement*

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[20] The PCAOB must conduct inspections at least once a year (or once every three years for smaller firms), a frequency requirement the Board can alter by rule with SEC approval. *See* §§ 7214(b)(1)-(2). But the SEC has no statutory authority to prevent and affirmatively command the initiation of an inspection of a given firm at a given time. *Id.* And even more importantly, the SEC has no statutory authority to manage the PCAOB's ongoing conduct of inspections of particular firms. On the contrary, the statute emphasizes the Board's discretion in the "[c]onduct of inspections." § 7214(d). Similarly, the fact that the PCAOB produces an inspection report that is submitted to the SEC and to state regulatory authorities does not mean the SEC (or the state regulatory authorities, for that matter) has statutory authority to manage the ongoing conduct of Board inspections.

[21] The majority asserts that Board investigations are "subject to Commission approval," at least "to the extent [an] inspection

actions. In addition, § 7202 provides that the SEC may promulgate rules "as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act." § 7202(a). The phrase "in furtherance of this Act" means, of course, that SEC rules have to further some aspect of the Act. But the Act nowhere gives the SEC authority to direct and supervise Board inspections, investigations, and enforcement actions. So § 7202 cannot be read as a bootstrapping provision that grants the SEC authority to issue rules giving itself power to direct and supervise Board inspections, investigations, and enforcement actions.[22] Finally, the SEC's related power to amend

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report forms the basis for a subsequent investigation." Maj. Op. at 15. But the majority's qualification undermines its assertion because the Board has absolute discretion to undertake investigations regardless of whether an inspection report has any particular content, or even whether such a report exists. *See* § 7215(b)(1). The statute specifies that the Board retains the power to "conduct an investigation of any act or practice . . . regardless of how the act, practice, or omission is brought to the attention of the Board." *Id.* The SEC thus does not have authority to prevent and affirmatively command Board investigations. Moreover, the Act does not give the SEC authority to manage the ongoing conduct of Board investigations.

[22] The fact that the Board must issue general rules governing investigations, and that such rules are subject to the approval of the SEC, does not give the SEC authority to prevent and affirmatively command, and to manage the ongoing conduct of investigations. There is a critical distinction between (i) approving general rules for investigations and (ii) preventing, affirmatively commanding, and managing the ongoing conduct of any particular investigation. The latter power is essential for true direction and supervision.

Board rules does not constitute a backdoor grant of authority to exercise direction and supervision over Board inspections, investigations, and enforcement actions.[23]

In short, the Board cobbles together disparate pieces of statutory text to justify its mantra that the SEC's control over the Board is "comprehensive and pervasive" and that Board members are therefore inferior officers. But the Board cannot answer three key questions that completely undermine its mantra: How can we say that the Board is directed and supervised by the SEC given that the Board has plenary statutory authority to conduct its most critical functions – inspections, investigations, and enforcement actions – without *any* opportunity for the SEC to prevent and affirmatively command, and to manage the ongoing conduct of, those activities? What is the purpose and effect of the stringent statutory for-cause removal provision if the Board is simply a subordinate of the SEC subject to the SEC's "comprehensive and pervasive" control? And why

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[23] There is a separate problem with reliance on § 7202 and § 7217. It is not at all clear whether a statutory grant of bootstrapping authority to an agency for that agency to issue rules granting itself supervisory power over another officer, as opposed to a direct statutory grant of such supervisory authority, suffices to constitute direction and supervision for purposes of the *Edmond* test. Even if it could suffice, it is doubtful that the *Edmond* inferior-officer test would be satisfied unless and until such rules were issued and took effect (the SEC has issued no such rules as to the PCAOB). In any event, I need not address those theoretical questions in this case because the Sarbanes-Oxley Act does not give the SEC statutory authority to issue rules giving itself direction and supervision authority over Board inspections, investigations, and enforcement actions.

should we accept the Board's characterization of itself as part of the SEC when, as both statutory text and history reveal, Congress specifically considered – and rejected – proposals to make the Board part of the SEC and Congress expressly decided to create the Board as an independent entity?

In sum, the PCAOB structure violates the Appointments Clause of Article II.[24]

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[24] Because I would hold that the Act violates the Appointments Clause, I need not address plaintiffs' alternative argument that the SEC cannot appoint inferior officers in the SEC because it is not a "Department" and its five Commissioners collectively are not its "Head" for Appointments Clause purposes. On those two issues, however, I generally agree with the majority opinion that plaintiffs' submission is inconsistent with current Supreme Court precedents. On the former issue of what entities constitute departments, *Freytag* nominally left open whether the SEC is a department; but as Justice Scalia explained in his persuasive concurrence for four Justices, it would not make much sense to hold that independent agencies are not departments so long as *Humphrey's Executor* is good law. *See Freytag*, 501 U.S. at 892 (Scalia, J., concurring in part). On the latter issue of who is a head of a department, both text and long-standing Executive Branch interpretation confirm that the head of a department can consist of multiple persons. *See The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 151-53 (1996); *Authority of Civil Service Commission To Appoint a Chief Examiner*, 37 Op. Att'y Gen. 227, 231 (1933).

Although the heads of independent agencies are principal officers and heads of departments for purposes of the Appointments Clause, it is worth pointing out (lest there be any future misunderstanding) that they are not principal officers for purposes of the 25th Amendment. The 25th Amendment refers to a majority of the "principal officers of the executive departments" who may vote on a President's incapacity; that

IV

In *Morrison*, the Supreme Court not only considered the appointment and removal issues separately, but also asked whether the combination of the appointment and removal mechanisms "taken as a whole" violated "the principle of separation of powers by unduly interfering with the role of the Executive Branch." 487 U.S. 654, 693 (1988).[25] The Court thus seemed to contemplate a scenario (albeit somewhat difficult to imagine) whereby a statute complied with Article II removal principles and with the Appointments Clause, but nonetheless violated the constitutional separation of powers because of restrictions on the President's appointment and removal powers. In this case, of course, I need not address that possibility because I find a constitutional problem on both the appointment and removal issues.[26]

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formulation was not intended to and does not include the heads of the so-called independent agencies.

[25] The Court cited *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977), as the basis for conducting this "taken as a whole" analysis. *See Morrison*, 487 U.S. at 693-96. *Nixon* was a case about executive privilege, not the President's appointment and removal powers.

[26] I do not read *Morrison* to contemplate the converse – that a statute that violates the removal precedents or the Appointments Clause could nonetheless be allowed under some kind of overriding separation of powers principle. That would make little sense, and the decisions in cases such as *Buckley* and *Bowsher* suggest that there is no such "taken as a whole" override that could excuse a violation of Article II removal principles or of the Appointments Clause.

In considering the combination of the appointment and removal problems posed by the PCAOB, I add only one point: From an accountability perspective, the whole of this statute is worse than the sum of the parts because neither the President nor his alter ego has any role in the *appointment* of Board members or in the *removal* of Board members. *Cf. Printz v. United States*, 521 U.S. 898, 922-23 (1997). Each problem compounds the other, as Professor Tribe perceptively suggested when describing the Article II accountability issue with this kind of structure: "[I]n the particular situation in which an inferior officer is appointed by persons who are themselves not politically accountable . . . ongoing supervision by a politically accountable official, whether by the President or by someone serving at the President's pleasure, seems particularly important. In such circumstances, where there is little or no political accountability at the front end for the choice of that officer, a 'for cause' limitation on removal that renders political supervision impossible appears troubling from an accountability perspective." LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 4-8, at 684 (3d ed. 2000); *see also Humphrey's Executor v. United States*, 295 U.S. 602, 625-26 (1935) (noting that independent agency would be independent of President "*except in its selection*").

This Act is a problem on the appointment front and on the removal front. And taken as a whole, this unprecedented extra-constitutional stew is a clear violation of Article II's text, original understanding, and history, and of Supreme Court precedents.

V

Three final points about this important case warrant comment.

First, the Department of Justice representing the United States as intervenor has defended the constitutionality of this statute.[27] To be sure, the defense has been rather tentative; at oral argument, the superb counsel from DOJ refused to say that the structure of the PCAOB would be permissible in *any* analogous situation, strongly implying that the Executive Branch's position is a ticket good for this train and this day only. In any event, the Executive Branch has defended the statute as consistent with Article II.[28] This is reason for respectful consideration.

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[27] History tells us that Executive Branch prerogatives have, in some instances, taken a backseat to the President's other more immediate policy, legislative, or political priorities. *See* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667, 734-36 (2003) ("Lincoln's vigorous and partisan use of the removal power . . . indicates his firm belief in the unitariness of the executive and the importance of presidential control throughout the executive branch. On the other hand, Lincoln offered no objection when Congress enacted legislation limiting Lincoln's power to remove the Comptroller of the Currency . . . .").

[28] The United States as intervenor has argued that the PCAOB is better from a Presidential control perspective than the private self-regulatory accounting organizations that previously existed to regulate the accounting industry. This is an odd argument as a matter of constitutional law. The fact that the President would have less control over a *private* organization than over an Executive Branch entity is both obvious and irrelevant. It certainly does not excuse compliance with Article II's principles

But as the Supreme Court has stated when this situation has arisen before, the Judiciary cannot defer to the Executive Branch in justiciable cases affecting individual rights simply because the Executive Branch does not assert its Article II prerogatives. The primary reason, as the Court has explained time after time, is that the separation of powers protects not simply the office and the officeholders, but also individual rights. As Justice Kennedy has stated, "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); *see also Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("The ultimate purpose of this separation of powers is to protect the liberty and security of the governed."); *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (separation of powers is "essential to the preservation of liberty"); *Bowsher v. Synar*, 478 U.S. 714, 721-22, 730 (1986) (separation of powers is "critical to preserving liberty"); *INS v. Chadha*, 462 U.S. 919, 963 n.4 (1983) (Powell, J., concurring in judgment) (discussing concern that "Congress is exercising unchecked judicial power at the expense of individual liberties" and stating it was "precisely to

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regarding Presidential appointment and removal of executive officers. *See The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 148 n.70 (1996) (Congress may not "evade the 'solemn obligations' of the doctrine of separation of powers by resorting to the corporate form . . . .") (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995)).

prevent such arbitrary action that the Framers adopted the doctrine of separation of powers").

The point was captured well by Justice Blackmun in his opinion for the Court in *Freytag*: "In reaching this conclusion, we note that we are not persuaded by the Commissioner's request that this Court defer to the Executive Branch's decision that there has been no legislative encroachment on Presidential prerogatives . . . . The structural principles embodied in the Appointments Clause do not speak only, or even primarily, of Executive prerogatives simply because they are located in Article II. . . . The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 879-80 (1991). So too here.

Second, in the wake of accounting scandals, Congress enacted the Sarbanes-Oxley Act and created the PCAOB to serve important policy goals. Courts must respect Congress's policy objectives. But as the Supreme Court has repeatedly stressed, the importance of a policy does not license the Judiciary to ignore or weaken constitutional limits arising out of the separation of powers. "[P]olicy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised." *Chadha*, 462 U.S. at 945. Even assuming that the statutory scheme structuring the PCAOB is an effective means to regulate the accounting industry, "that a given law or procedure is efficient, convenient, and useful in facilitating functions of government,

standing alone, will not save it if it is contrary to the Constitution." *Id.* at 944. Over the years, the Supreme Court thus has struck down as inconsistent with the constitutional separation of powers the original method of appointing the Federal Election Commission, the legislative veto, the provision for congressional removal of the Comptroller General, the structure of the Metropolitan Washington Airports Authority's Board of Review, and the Line-Item Veto Act – several of which were at least as important as the PCAOB in terms of their policy objectives. Congress, fearing another accounting meltdown, may have "had good reason" for creating the PCAOB, but "such fears, however rational, do not by themselves warrant a distortion of the Framers' work." *Buckley v. Valeo*, 424 U.S. 1, 134 (1976).

Third, to reiterate, the PCAOB is uniquely structured, and a judicial holding invalidating it would be uniquely limited to the PCAOB. And Congress could easily fix the constitutional flaws by, for example, making PCAOB members subject to Presidential appointment with the advice and consent of the Senate and therefore removable by the President. *Cf.* Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008) (creating new "independent" federal regulator of Fannie Mae and Freddie Mac appointed by President with advice and consent of Senate and removable for cause by President). Alternatively, Congress could fix the problem by making the PCAOB a truly subordinate part of the SEC – for example, by giving the SEC express authority to direct and supervise all Board actions and to fire Board members at will. In such a structure, the Board would not differ from any other inferior officers in the SEC. In the meantime,

in my judgment, the Board's structure violates the Constitution of the United States.

* * *

I would hold that the PCAOB's structure unconstitutionally restricts the President's appointment and removal powers. I respectfully dissent.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREE ENTERPRISE FUND, *et al.*,	:	
Plaintiffs,	:	
v.	:	Civil Action
PUBLIC COMPANY ACCOUNTING	:	No. 06-0217
OVERSIGHT BOARD, *et al.*,	:	(JR)
Defendants.	:	

ORDER

For the reasons set forth in the accompanying memorandum, defendants' motions for summary judgment [37 and 41] are **granted**. It is **SO ORDERED**.

JAMES ROBERTSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREE ENTERPRISE FUND, *et al.*,	:	
Plaintiffs,	:	
v.	:	Civil Action No.
	:	06-0217 (JR)
THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, *et al.*,	:	
Defendants.	:	

MEMORANDUM

Plaintiff Free Enterprise Fund, a non-profit organization, and plaintiff Beckstead & Watts, LLP, a Nevada accounting firm, present a constitutional challenge to the creation and empowerment of the Public Company Accounting Oversight Board, an entity created by the Sarbanes-Oxley Act that is charged with overseeing and regulating the auditing of public companies subject to securities laws. Plaintiffs claim that the PCAOB violates separation-of-powers principles (Count I), the Appointments Clause (Count II), and the non-delegation doctrine (Count III). Defendants, including the United States as Intervenor-defendant, have moved to dismiss, [17], [18]. All parties have moved for summary judgment [28], [37], [41]. For the reasons discussed below, the defendants' motions for summary judgment will be **granted**.

Background

In 2002, following a series of accounting scandals that exposed weaknesses in the reporting requirements for publicly held companies, Congress

passed the Sarbanes-Oxley Act of 2002 ("the Act" or "SOX"), 15 U.S.C. §§ 7201 et seq. Title I of the Act established the PCAOB as a new entity to oversee the audits of public companies. SOX § 101(a), 15 U.S.C. § 7211(a). The Board's purpose is "to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to, and held by and for, public investors." *Id.* The Act empowered the Securities and Exchange Commission to vest the Board with certain responsibilities, such as enacting auditing standards, inspecting and investigating auditors of public companies, and setting its own budget. 15 U.S.C. § 7211(c).

The five members of the PCAOB are appointed by the SEC after consultation with the Chairman of the Board of Governors of the Federal Reserve and the Secretary of the Treasury. 15 U.S.C. § 7211(e)(4)(A). Two members must be or have been certified public accountants. 15 U.S.C. § 7211(e)(2). After its members are appointed by the SEC, the Board assumes its responsibilities only upon the Commission's determination that the Board has the capacity to carry out the Act's requirements. 15 U.S.C. § 7211(d). No Board rule becomes effective unless and until approved by the SEC. 15 U.S.C. § 217(b)(2). To approve a rule, the Commission generally must conduct its own notice-and-comment proceedings, and must find that the rule is "consistent with the requirements of [SOX] and the securities law, or is necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 7217(b)(3). Both the structure of the Board and its relationship to the Commission resemble

those of other self-regulatory organizations ("SRO"), such as the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD"), that contribute to the work of the SEC, and the Act specifically incorporates certain review provisions from statutes establishing other SROs. For example, as with SROs, the SEC retains the power to change, add to, or withdraw PCAOB rules at any time. 15 U.S.C. § 7217(b)(5) (incorporating 15 U.S.C. § 78s(c)).

The Act requires auditors of public companies to register with the PCAOB by submitting applications to the PCAOB, filing periodic reports with the PCAOB, and paying fees to the PCAOB. 15 U.S.C. § 7212. The SEC may review the PCAOB's accounting support fee rules, 15 U.S.C. §§ 7219(d), 7217(b), and denials of regulation applications, 15 U.S.C. § 7212(c)(2). The PCAOB may inspect accounting firms and release interim reports detailing any deficiencies in advance of its final conclusions. 15 U.S.C. § 7214(g). When the PCAOB investigates a potential securities law violation, the Board must both inform the Commission and coordinate its activities with the Commission. 15 U.S.C. § 7215(b)(4)(A). If a company violates PCAOB rules governing the auditing of public companies, it will be subject to disciplinary actions and sanctions by the PCAOB. 15 U.S.C. § 7215(c)(4). Any violation of PCAOB rules "shall be treated . . . as a violation of the Securities Exchange Act of 1934." 15 U.S.C. § 7202(b). If the PCAOB determines, after investigation, that an accounting firm has committed a violation, it has the power to impose an appropriate sanction, 15 U.S.C. § 7215(c)(4), but companies may seek Commission review of unfavorable Board

determinations, 15 U.S.C. § 7217(c), and sanctions imposed by the PCAOB are generally stayed pending Commission review of the inspection report, 15 U.S.C. § 7215(e). The Commission may alter or cancel a sanction imposed by the PCAOB if, "having due regard for the public interest and the protection of investors," the SEC finds that the sanction is "not necessary or appropriate in furtherance of this Act or the securities laws" or is "excessive, oppressive, inadequate, or otherwise not appropriate." 15 U.S.C. § 7217(c)(3). Final Commission decisions are reviewable by the Court of Appeals.

Plaintiff Beckstead and Watts ("BW"), a small Nevada accounting firm, was inspected by the Board in 2004 and is the subject of an ongoing disciplinary investigation. On September 28, 2005, the PCAOB issued a report detailing its inspection of Beckstead & Watts, available on the PCAOB website at http://www.pcaobus.org/Inspections/Public_Reports/2005/Beckstead_and_Watts.pdf. Plaintiff Free Enterprise Fund ("FEF") is "a non-profit, public interest organization" promoting "economic growth, lower taxes, and limited government." [1] ¶ 11. FEF avers that its members are subject to the PCAOB's authority and have been harmed by its regulations. *Id.* James Terry, Executive Director of FEF, asserts that because the organization takes unpopular positions, it is the policy of FEF not to disclose the identity of its members. [47-3]. However, Terry explains, FEF's members include Beckstead and Watts and other companies on both the PCAOB's List of Issuers with No Outstanding Past-Due Share of the Accounting Support Fee and the PCAOB's List of Registered Public Accounting Firms. *Id.*

The plaintiffs seek an order enjoining the Board from taking any further action against BW and a judgment declaring that the provisions of the Act establishing the PCAOB are unconstitutional. [1] at 23. BW alleges that it has been injured by the Board's auditing standards, which have substantially increased the time and expense of its public company audits and reduced both its client capacity and its overall profits, and that the Board's inspection report has damaged its professional reputation. *Id.* at 18-19. Finally, BW asserts that the Board's ongoing investigation is subjecting it to burdensome discovery and legal fees. *Id.* at 19.

Plaintiffs have not raised their claims before the PCAOB, the SEC, or the Court of Appeals; did not submit comments during the SEC's review of the PCAOB's proposed rules; have not sought review of the SEC's approval of the Board's rules; and have not filed a petition for rulemaking with the SEC to alter or withdraw the Board's powers, as permitted by 15 U.S.C. § 7217(d)(1).

Analysis

I. Motion to Dismiss

PCAOB identifies several grounds for dismissal. It asserts lack of subject matter jurisdiction because plaintiffs have bypassed the exclusive review established by SOX and failed to exhaust administrative remedies, [17] at 15-36, and because plaintiffs have failed to identify a cause of action authorizing this lawsuit. *Id.* at 37-38. And PCAOB maintains that plaintiffs lack standing, because (1) the FEF has not alleged a specific injury, *see Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1275 (D.C. Cir. 1994)

(allegations of injury during pleading stage must not be "too general"); (2) restrictions on the Commission's appointment authority may be raised only by the restricted officer, not a private party, *see FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993); and (3) there is no reason to assume that a successful challenge to the Act's grant of authority to the entire SEC to appoint members of the PCAOB would prevent plaintiff's injury, *see Reuss v. Balles*, 584 F.2d 461 (D.C. Cir. 1978). [17] at 38-43.

These arguments are colorable but ultimately unsuccessful. The standing of Beckstead and Watts is essentially conceded by the defendants, with the exception of certain appointments clause claims, and FEF has standing because at least one member of its organization is being regulated by the PCAOB (namely, Beckstead & Watts).[1] The jurisdictional arguments fail because the plaintiffs' facial constitutional challenges, which take aim at very structure of the PCAOB, are collateral to the Act's statutory scheme, and are therefore outside the universe of cases subject to the implicitly exclusive administrative review established by the Act, *see Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994); *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976); *Gen. Elec. Co. v. EPA*, 360 F.3d 188 (D.C. Cir. 2004) (per curiam).

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[1] Note that, as explained below, plaintiffs lack standing to raise the portion of their appointments clause claim challenging the appointment of PCAOB members by the entire SEC. Since this infirmity infects only part of plaintiffs' appointment clause claim, it will be addressed in the summary judgment analysis.

II. Motions for Summary Judgment

As a threshold matter, defendants ask that I consider the PCAOB to be a governmental entity, [37] at 10, n.3, even though the Act provides that the PCAOB is "not . . . an agency or establishment of the United States Government," describing it instead as a "body corporate, [to] operate as a nonprofit corporation," with "all the powers conferred upon a nonprofit corporation by, the District of Columbia Nonprofit Corporation Act." 15 U.S.C. §§ 7211(a), (b). The parties agree that, at least for purposes of these motions, PCAOB should be considered a governmental entity, and so it shall be. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995).

Count II: The Appointments Clause

Plaintiffs complain that the appointment of PCAOB members violates the Appointments Clause of the Constitution, U.S. Const. art. II, § 2. The Appointments Clause empowers the President to appoint "Officers of the United States," while allowing Congress to vest the appointment of "inferior Officers" in the President, Courts of Law, or Heads of Departments. *Id.* Since PCAOB members are neither appointed nor supervised on a day-to-day basis by principal officers directly accountable to the president, plaintiffs argue, they are not inferior officers, and therefore must be appointed by the President. [28] at 29-34, citing *Edmond v. United States*, 520 U.S. 651 (1997), *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), and *Morrison v. Olson*, 487 U.S. 654 (1998).

Edmond, however, along with three notable decisions from this Circuit, actually favors

defendants' submission, that PCAOB members are inferior officers. As with judges of the Coast Guard Court of Criminal Appeals, PCAOB members "have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers," *Edmond*, 520 at 665, and are subject to administrative oversight and removal authority by the Commission, *Id.* at 664. *See also, NASD SEC*, 431 F.3d 803 (D.C. Cir. 2005) (NASD may not regulate independently of the SEC control); *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000) (Administrative Law Judges are neither principal nor inferior officers because they lack the power to render final decisions); *In re: Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987) (Independent Counsel is not a principal officer because the regulations empowering the office are rescindable through normal procedures).

Plaintiffs argue in the alternative that, even if PCAOB members are inferior officers, their appointment by the SEC is unconstitutional because the SEC is not a "department" for constitutional purposes, and because, even if it is a department, the appointment power must be vested in its chairperson, not in the entire Commission.

The four concurring justices in *Freytag* who reached the question of the SEC's constitutional status all agreed that it is, in fact, a department, 501 U.S. at 916, and the defendants are likely to succeed on this point. Defendants' contention that the "head" of the SEC is the SEC as a whole, however, is a stretch. Only one court's decision is cited in support of that argument: *Silver v. United States Postal Service*, 951 F.2d 1033, 1038 (9th Cir. 1991). That decision did hold that the nine governors of the U.S.

Postal Service ("USPS") are its collective "head" for constitutional purposes, but the role of USPS governors is significantly different from that of SEC Commissioners. *Id.* When deciding who should be considered the head of the USPS – (1) the nine governors, (2) the Postmaster General, or (3) the board of governors (including the nine governors, the Postmaster General, and the Deputy Postmaster General) – the Court settled on the nine governors because only they are empowered to appoint and remove the Postmaster General and to revoke authority delegated to the board. *Id.* The SEC may neither appoint nor remove the SEC Chairman, nor may the SEC revoke authority delegated to the entire Commission. Multimember bodies may, on occasion, properly constitute heads of departments for Appointments Clause purposes, but the SEC is not one of them.

On this point, however – that PCAOB members should have been appointed by the SEC Chairman rather than by the entire Commission the plaintiffs lack standing. Their injury is not traceable to this infirmity, since the SEC Chairman has voted for each PCAOB member, [17] fn. 28, and they do not allege that their injuries are in any way attributable to the current membership of the PCAOB, so it is not clear how a favorable outcome would redress their complaint. *See Nat'l Treasury Employees Union v. Reagan*, 663 F.2d 239, 246 n.9 (D.C. Cir. 1981) (duty to appoint may be discharged by consenting to an appointment made by another person).

Count I: Separation of Powers

The Supreme Court has never held that the Constitution requires the President to maintain

direct removal power over inferior officers. In *Morrison v. Olson*, when the Court upheld the independent counsel statute, it noted that certain "purely executive officials" must be removable by the President at will, 487 U.S. 684, 690 (1988), but PCAOB members are not in that category. Here, as in *Morrison*, the President has not been "completely stripped" of his ability to remove PCAOB members, *Morrison*, 487 U.S. at 692, because SEC Commissioners can be removed by the President for cause, *see SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988), and PCAOB members can be removed by the SEC "for good cause shown[,]" 15 U.S.C. § 7211(e)(6). This standard is expanded upon in 15 U.S.C. § 7217(d)(3): good cause exists when PCAOB members commit certain willful violations, abuse their authority, or unreasonably fail to enforce compliance with rules or professional standards. The scope of the Act's "good cause" limitation is disputed: plaintiffs claim that it prohibits removal for negligent misconduct, [28] at 2-23, while defendants insist that some negligent behavior constitutes a willful violation of securities law, [37] at 36-37, *citing Wonsover v. SEC*, 205 F.3d 408, 413-15 (D.C. Cir. 2000) – but resolution of this dispute is unnecessary. Plaintiffs' claim of facial unconstitutionality fails unless the removal limitations of which they complain are unduly severe in all circumstances, *see United States v. Salerno*, 481 U.S. 739, 745, (1987); *Steffan v. Perry*, 41 F.3d 677, (D.C. Cir. 1994) (en banc)(if a statute's provisions may be constitutionally applied in some circumstances, a plaintiff must demonstrate that the statute is unconstitutional as applied). Since I find that the SEC may plausibly interpret its removal authority as suggested by

defendants, the removal provisions are sufficient to withstand plaintiffs' facial constitutional challenge.

Count III: Non-Delegation Doctrine[2]

Plaintiffs allege that Congress has unlawfully delegated legislative power to the PCAOB in violation of Article I, section 1 of the Constitution, which vests "[a]ll legislative Powers . . . in a Congress of the United States." This claim is easily disposed of. As defendants point out, the auditing, quality control, and ethics standards the PCAOB is to apply "must either be 'required by [the] Act or the rules of the Commission' or 'necessary or appropriate in the public interest or for the protection of investors[,]'" [37] at 41, citing 15 U.S.C. § 7213(a)(1). These are "intelligible" standards within the meaning of *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001), in which the Supreme Court acknowledged finding intelligible principles in "various statutes authorizing regulation in the 'public interest[,]'" 531 U.S. at 474. The legislative delegation effected by the Act is squarely within the bounds of modern non-delegation doctrine.

III. Conclusion

The plaintiffs have brought a facial challenge to the PCAOB, presenting nothing but an hypothetical scenario of an over-zealous or rogue PCAOB investigator. They have not responded to defendants' argument that, if such a scenario became real, the SEC could change the rules to prevent improper investigations or remove PCAOB members for "good

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[2] Note that the PCAOB will be considered a public entity for non-delegation analysis as well.

cause." They have failed, in other words, to demonstrate that "no set of circumstances exists under which the Act would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), and judgment must accordingly be entered for the defendants.

An appropriate order accompanies this memorandum.

JAMES ROBERTSON
United States District Judge

The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. §§ 7201 *et seq.*)

§ 1. Short Title; Table of Contents.

(a) SHORT TITLE.—This Act may be cited as the "Sarbanes-Oxley Act of 2002".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Definitions.

Sec. 3. Commission rules and enforcement.

TITLE I—PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

Sec. 101. Establishment; administrative provisions.

Sec. 102. Registration with the Board.

Sec. 103. Auditing, quality control, and independence standards and rules.

Sec. 104. Inspections of registered public accounting firms.

Sec. 105. Investigations and disciplinary proceedings.

Sec. 106. Foreign public accounting firms.

Sec. 107. Commission oversight of the Board.

Sec. 108. Accounting standards.

Sec. 109. Funding.

* * * * *

§ 2, 15 U.S.C. § 7201. Definitions.

(a) IN GENERAL.—In this Act, the following definitions shall apply:

(1) APPROPRIATE STATE REGULATORY AUTHORITY.—The term "appropriate State regulatory authority" means the State agency or other authority responsible for the licensure or other regulation of the practice of accounting in the State or States having jurisdiction over a registered public accounting firm or associated person thereof, with respect to the matter in question.

(2) AUDIT.—The term "audit" means an examination of the financial statements of any issuer by an independent public accounting firm in accordance with the rules of the Board or the Commission (or, for the period preceding the adoption of applicable rules of the Board under section 103, in accordance with then-applicable generally accepted auditing and related standards for such purposes), for the purpose of expressing an opinion on such statements.

(3) AUDIT COMMITTEE.—The term "audit committee" means—

(A) a committee (or equivalent body) established by and amongst the board of directors of an issuer for the purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer; and

(B) if no such committee exists with respect to an issuer, the entire board of directors of the issuer.

(4) AUDIT REPORT.—The term "audit report" means a document or other record—

(A) prepared following an audit performed for purposes of compliance by an issuer with the requirements of the securities laws; and

(B) in which a public accounting firm either—

(i) sets forth the opinion of that firm regarding a financial statement, report, or other document; or

(ii) asserts that no such opinion can be expressed.

(5) BOARD.—The term "Board" means the Public Company Accounting Oversight Board established under section 101.

(6) COMMISSION.—The term "Commission" means the Securities and Exchange Commission.

(7) ISSUER.—The term "issuer" means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 78l), or that is required to file reports under section 15(d) (15 U.S.C. 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn.

(8) NON-AUDIT SERVICES.—The term "non-audit services" means any professional services provided to an issuer by a registered public accounting firm, other than those provided to an issuer in connection with an audit or a review of the financial statements of an issuer.

(9) PERSON ASSOCIATED WITH A PUBLIC ACCOUNTING FIRM.—

(A) IN GENERAL.—The terms "person associated with a public accounting firm" (or with a "registered public accounting firm") and "associated person of a public accounting firm" (or of a "registered public accounting firm") mean any individual proprietor, partner, shareholder, principal, accountant, or other professional employee of a public accounting firm, or any other independent contractor or entity that, in connection with the preparation or issuance of any audit report—

(i) shares in the profits of, or receives compensation in any other form from, that firm; or

(ii) participates as agent or otherwise on behalf of such accounting firm in any activity of that firm.

(B) EXEMPTION AUTHORITY.—The Board may, by rule, exempt persons engaged only in ministerial tasks from the definition in subparagraph (A), to the extent that the Board determines that any such exemption is consistent with the purposes of this Act, the public interest, or the protection of investors.

(10) PROFESSIONAL STANDARDS.—The term "professional standards" means—

(A) accounting principles that are—

(i) established by the standard setting body described in section 19(b) of the Securities Act of 1933, as amended by this Act, or prescribed by the Commission under section 19(a) of that Act (15 U.S.C. 17a(s)) or section 13(b) of the

Securities Exchange Act of 1934 (15 U.S.C. 78a(m)); and

(ii) relevant to audit reports for particular issuers, or dealt with in the quality control system of a particular registered public accounting firm; and

(B) auditing standards, standards for attestation engagements, quality control policies and procedures, ethical and competency standards, and independence standards (including rules implementing title II) that the Board or the Commission determines—

(i) relate to the preparation or issuance of audit reports for issuers; and

(ii) are established or adopted by the Board under section 103(a), or are promulgated as rules of the Commission.

(11) PUBLIC ACCOUNTING FIRM.—The term "public accounting firm" means—

(A) a proprietorship, partnership, incorporated association, corporation, limited liability company, limited liability partnership, or other legal entity that is engaged in the practice of public accounting or preparing or issuing audit reports; and

(B) to the extent so designated by the rules of the Board, any associated person of any entity described in subparagraph (A).

(12) REGISTERED PUBLIC ACCOUNTING FIRM. The term "registered public accounting firm" means a public accounting firm registered with the Board in accordance with this Act.

(13) RULES OF THE BOARD.—The term "rules of the Board" means the bylaws and rules of the Board (as submitted to, and approved, modified, or amended by the Commission, in accordance with section 107), and those stated policies, practices, and interpretations of the Board that the Commission, by rule, may deem to be rules of the Board, as necessary or appropriate in the public interest or for the protection of investors.

(14) SECURITY.—The term "security" has the same meaning as in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)).

(15) SECURITIES LAWS.—The term "securities laws" means the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), as amended by this Act, and includes the rules, regulations, and orders issued by the Commission thereunder.

(16) STATE.—The term "State" means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other territory or possession of the United States.

(b) CONFORMING AMENDMENT.—Section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)) is amended by inserting "the Sarbanes-Oxley Act of 2002," before "the Public".

§ 3, 15 U.S.C. § 7202. Commission Rules and Enforcement.

(a) REGULATORY ACTION.—The Commission shall promulgate such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act.

(b) ENFORCEMENT.—

(1) IN GENERAL.—A violation by any person of this Act, any rule or regulation of the Commission issued under this Act, or any rule of the Board shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or the rules and regulations issued thereunder, consistent with the provisions of this Act, and any such person shall be subject to the same penalties, and to the same extent, as for a violation of that Act or such rules or regulations.

(2) INVESTIGATIONS, INJUNCTIONS, AND PROSECUTION OF OFFENSES.—Section 21 of the Securities Exchange Act of 1934 (15 U.S.C. 78u) is amended—

(A) in subsection (a)(1), by inserting "the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm," after "is a participant,";

(B) in subsection (d)(1), by inserting "the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm," after "is a participant,";

(C) in subsection (e), by inserting "the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm," after "is a participant,"; and

(D) in subsection (f), by inserting "or the Public Company Accounting Oversight Board" after

"self-regulatory organization" each place that term appears.

(3) CEASE-AND-DESIST PROCEEDINGS.—Section 21C(c)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78u-3(c)(2)) is amended by inserting "registered public accounting firm (as defined in section 2 of the Sarbanes-Oxley Act of 2002)," after "government securities dealer,".

(4) ENFORCEMENT BY FEDERAL BANKING AGENCIES.—Section 12(i) of the Securities Exchange Act of 1934 (15 U.S.C. 78l(i)) is amended by—

(A) striking "sections 12," each place it appears and inserting "sections 10A(m), 12,"; and

(B) striking "and 16," each place it appears and inserting "and 16 of this Act, and sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act of 2002,".

(c) EFFECT ON COMMISSION AUTHORITY.—Nothing in this Act or the rules of the Board shall be construed to impair or limit—

(1) the authority of the Commission to regulate the accounting profession, accounting firms, or persons associated with such firms for purposes of enforcement of the securities laws;

(2) the authority of the Commission to set standards for accounting or auditing practices or auditor independence, derived from other provisions of the securities laws or the rules or regulations thereunder, for purposes of the preparation and issuance of any audit report, or otherwise under applicable law; or

(3) the ability of the Commission to take, on the initiative of the Commission, legal, administrative, or disciplinary action against any registered public accounting firm or any associated person thereof.

TITLE I—PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

§ 101, 15 U.S.C. § 7211. Establishment; Administrative Provisions.

(a) ESTABLISHMENT OF BOARD.—There is established the Public Company Accounting Oversight Board, to oversee the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to, and held by and for, public investors. The Board shall be a body corporate, operate as a nonprofit corporation, and have succession until dissolved by an Act of Congress.

(b) STATUS.—The Board shall not be an agency or establishment of the United States Government, and, except as otherwise provided in this Act, shall be subject to, and have all the powers conferred upon a nonprofit corporation by, the District of Columbia Nonprofit Corporation Act. No member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service.

(c) DUTIES OF THE BOARD.—The Board shall, subject to action by the Commission under section 107, and once a determination is made by the Commission under subsection (d) of this section—

(1) register public accounting firms that prepare audit reports for issuers, in accordance with section 102;

(2) establish or adopt, or both, by rule, auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports for issuers, in accordance with section 103;

(3) conduct inspections of registered public accounting firms, in accordance with section 104 and the rules of the Board;

(4) conduct investigations and disciplinary proceedings concerning, and impose appropriate sanctions where justified upon, registered public accounting firms and associated persons of such firms, in accordance with section 105;

(5) perform such other duties or functions as the Board (or the Commission, by rule or order) determines are necessary or appropriate to promote high professional standards among, and improve the quality of audit services offered by, registered public accounting firms and associated persons thereof, or otherwise to carry out this Act, in order to protect investors, or to further the public interest;

(6) enforce compliance with this Act, the rules of the Board, professional standards, and the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, by registered public accounting firms and associated persons thereof; and

(7) set the budget and manage the operations of the Board and the staff of the Board.

(d) COMMISSION DETERMINATION.—The members of the Board shall take such action (including hiring of staff, proposal of rules, and adoption of initial and transitional auditing and other professional standards) as may be necessary or appropriate to enable the Commission to determine, not later than 270 days after the date of enactment of this Act, that the Board is so organized and has the capacity to carry out the requirements of this title, and to enforce compliance with this title by registered public accounting firms and associated persons thereof. The Commission shall be responsible, prior to the appointment of the Board, for the planning for the establishment and administrative transition to the Board's operation.

(e) BOARD MEMBERSHIP.—

(1) COMPOSITION.—The Board shall have 5 members, appointed from among prominent individuals of integrity and reputation who have a demonstrated commitment to the interests of investors and the public, and an understanding of the responsibilities for and nature of the financial disclosures required of issuers under the securities laws and the obligations of accountants with respect to the preparation and issuance of audit reports with respect to such disclosures.

(2) LIMITATION.—Two members, and only 2 members, of the Board shall be or have been certified public accountants pursuant to the laws of 1 or more States, provided that, if 1 of those 2 members is the chairperson, he or she may not have been a practicing certified public accountant for at least 5 years prior to his or her appointment to the Board.

(3) FULL-TIME INDEPENDENT SERVICE.—Each member of the Board shall serve on a full-time basis, and may not, concurrent with service on the Board, be employed by any other person or engage in any other professional or business activity. No member of the Board may share in any of the profits of, or receive payments from, a public accounting firm (or any other person, as determined by rule of the Commission), other than fixed continuing payments, subject to such conditions as the Commission may impose, under standard arrangements for the retirement of members of public accounting firms.

(4) APPOINTMENT OF BOARD MEMBERS.—

(A) INITIAL BOARD.—Not later than 90 days after the date of enactment of this Act, the Commission, after consultation with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury, shall appoint the chairperson and other initial members of the Board, and shall designate a term of service for each.

(B) VACANCIES.—A vacancy on the Board shall not affect the powers of the Board, but shall be filled in the same manner as provided for appointments under this section.

(5) TERM OF SERVICE.—

(A) IN GENERAL.—The term of service of each Board member shall be 5 years, and until a successor is appointed, except that—

(i) the terms of office of the initial Board members (other than the chairperson) shall expire in annual increments, 1 on each of the

first 4 anniversaries of the initial date of appointment; and

(ii) any Board member appointed to fill a vacancy occurring before the expiration of the term for which the predecessor was appointed shall be appointed only for the remainder of that term.

(B) TERM LIMITATION.—No person may serve as a member of the Board, or as chairperson of the Board, for more than 2 terms, whether or not such terms of service are consecutive.

(6) REMOVAL FROM OFFICE.—A member of the Board may be removed by the Commission from office, in accordance with section 107(d)(3), for good cause shown before the expiration of the term of that member.

(f) POWERS OF THE BOARD.—In addition to any authority granted to the Board otherwise in this Act, the Board shall have the power, subject to section 107—

(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, with the approval of the Commission, in any Federal, State, or other court;

(2) to conduct its operations and maintain offices, and to exercise all other rights and powers authorized by this Act, in any State, without regard to any qualification, licensing, or other provision of law in effect in such State (or a political subdivision thereof);

(3) to lease, purchase, accept gifts or donations of or otherwise acquire, improve, use, sell, exchange,

or convey, all of or an interest in any property, wherever situated;

(4) to appoint such employees, accountants, attorneys, and other agents as may be necessary or appropriate, and to determine their qualifications, define their duties, and fix their salaries or other compensation (at a level that is comparable to private sector self-regulatory, accounting, technical, supervisory, or other staff or management positions);

(5) to allocate, assess, and collect accounting support fees established pursuant to section 109, for the Board, and other fees and charges imposed under this title; and

(6) to enter into contracts, execute instruments, incur liabilities, and do any and all other acts and things necessary, appropriate, or incidental to the conduct of its operations and the exercise of its obligations, rights, and powers imposed or granted by this title.

(g) RULES OF THE BOARD.—The rules of the Board shall, subject to the approval of the Commission—

(1) provide for the operation and administration of the Board, the exercise of its authority, and the performance of its responsibilities under this Act;

(2) permit, as the Board determines necessary or appropriate, delegation by the Board of any of its functions to an individual member or employee of the Board, or to a division of the Board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any matter, except that—

(A) the Board shall retain a discretionary right to review any action pursuant to any such delegated function, upon its own motion;

(B) a person shall be entitled to a review by the Board with respect to any matter so delegated, and the decision of the Board upon such review shall be deemed to be the action of the Board for all purposes (including appeal or review thereof); and

(C) if the right to exercise a review described in subparagraph (A) is declined, or if no such review is sought within the time stated in the rules of the Board, then the action taken by the holder of such delegation shall for all purposes, including appeal or review thereof, be deemed to be the action of the Board;

(3) establish ethics rules and standards of conduct for Board members and staff, including a bar on practice before the Board (and the Commission, with respect to Board-related matters) of 1 year for former members of the Board, and appropriate periods (not to exceed 1 year) for former staff of the Board; and

(4) provide as otherwise required by this Act.

(h) ANNUAL REPORT TO THE COMMISSION.—The Board shall submit an annual report (including its audited financial statements) to the Commission, and the Commission shall transmit a copy of that report to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives, not later than 30 days after the date of receipt of that report by the Commission.

§ 102, 15 U.S.C. § 7212. Registration with the Board.

(a) MANDATORY REGISTRATION.—Beginning 180 days after the date of the determination of the Commission under section 101(d), it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer.

(b) APPLICATIONS FOR REGISTRATION.—

(1) FORM OF APPLICATION.—A public accounting firm shall use such form as the Board may prescribe, by rule, to apply for registration under this section.

(2) CONTENTS OF APPLICATIONS.—Each public accounting firm shall submit, as part of its application for registration, in such detail as the Board shall specify—

(A) the names of all issuers for which the firm prepared or issued audit reports during the immediately preceding calendar year, and for which the firm expects to prepare or issue audit reports during the current calendar year;

(B) the annual fees received by the firm from each such issuer for audit services, other accounting services, and non-audit services, respectively;

(C) such other current financial information for the most recently completed fiscal year of the firm as the Board may reasonably request;

(D) a statement of the quality control policies of the firm for its accounting and auditing practices;

(E) a list of all accountants associated with the firm who participate in or contribute to the preparation of audit reports, stating the license or certification number of each such person, as well as the State license numbers of the firm itself;

(F) information relating to criminal, civil, or administrative actions or disciplinary proceedings pending against the firm or any associated person of the firm in connection with any audit report;

(G) copies of any periodic or annual disclosure filed by an issuer with the Commission during the immediately preceding calendar year which discloses accounting disagreements between such issuer and the firm in connection with an audit report furnished or prepared by the firm for such issuer; and

(H) such other information as the rules of the Board or the Commission shall specify as necessary or appropriate in the public interest or for the protection of investors.

(3) CONSENTS.—Each application for registration under this subsection shall include—

(A) a consent executed by the public accounting firm to cooperation in and compliance with any request for testimony or the production of documents made by the Board in the furtherance of its authority and responsibilities under this title (and an agreement to secure and enforce similar consents from each of the associated persons of the public accounting firm as a condition of their continued employment by or other association with such firm); and

(B) a statement that such firm understands and agrees that cooperation and compliance, as described in the consent required by subparagraph (A), and the securing and enforcement of such consents from its associated persons, in accordance with the rules of the Board, shall be a condition to the continuing effectiveness of the registration of the firm with the Board.

(c) ACTION ON APPLICATIONS.—

(1) TIMING.—The Board shall approve a completed application for registration not later than 45 days after the date of receipt of the application, in accordance with the rules of the Board, unless the Board, prior to such date, issues a written notice of disapproval to, or requests more information from, the prospective registrant.

(2) TREATMENT.—A written notice of disapproval of a completed application under paragraph (1) for registration shall be treated as a disciplinary sanction for purposes of sections 105(d) and 107(c).

(d) PERIODIC REPORTS.—Each registered public accounting firm shall submit an annual report to the Board, and may be required to report more frequently, as necessary to update the information contained in its application for registration under this section, and to provide to the Board such additional information as the Board or the Commission may specify, in accordance with subsection (b)(2).

(e) PUBLIC AVAILABILITY.—Registration applications and annual reports required by this subsection, or such portions of such applications or reports as may be designated under rules of the

Board, shall be made available for public inspection, subject to rules of the Board or the Commission, and to applicable laws relating to the confidentiality of proprietary, personal, or other information contained in such applications or reports, provided that, in all events, the Board shall protect from public disclosure information reasonably identified by the subject accounting firm as proprietary information.

(f) REGISTRATION AND ANNUAL FEES.—The Board shall assess and collect a registration fee and an annual fee from each registered public accounting firm, in amounts that are sufficient to recover the costs of processing and reviewing applications and annual reports.

§ 103, 15 U.S.C. § 7213. Auditing, Quality Control, and Independence Standards and Rules.

(a) AUDITING, QUALITY CONTROL, AND ETHICS STANDARDS.—

(1) IN GENERAL.—The Board shall, by rule, establish, including, to the extent it determines appropriate, through adoption of standards proposed by 1 or more professional groups of accountants designated pursuant to paragraph (3)(A) or advisory groups convened pursuant to paragraph (4), and amend or otherwise modify or alter, such auditing and related attestation standards, such quality control standards, and such ethics standards to be used by registered public accounting firms in the preparation and issuance of audit reports, as required by this Act or the rules of the Commission, or as may be necessary or appropriate in the public interest or for the protection of investors.

(2) RULE REQUIREMENTS.—In carrying out paragraph (1), the Board—

(A) shall include in the auditing standards that it adopts, requirements that each registered public accounting firm shall—

(i) prepare, and maintain for a period of not less than 7 years, audit work papers, and other information related to any audit report, in sufficient detail to support the conclusions reached in such report;

(ii) provide a concurring or second partner review and approval of such audit report (and other related information), and concurring approval in its issuance, by a qualified person (as prescribed by the Board) associated with the public accounting firm, other than the person in charge of the audit, or by an independent reviewer (as prescribed by the Board); and

(iii) describe in each audit report the scope of the auditor's testing of the internal control structure and procedures of the issuer, required by section 404(b), and present (in such report or in a separate report)—

(I) the findings of the auditor from such testing;

(II) an evaluation of whether such internal control structure and procedures—

(aa) include maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer;

(bb) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer; and

(III) a description, at a minimum, of material weaknesses in such internal controls, and of any material noncompliance found on the basis of such testing.

(B) shall include, in the quality control standards that it adopts with respect to the issuance of audit reports, requirements for every registered public accounting firm relating to—

(i) monitoring of professional ethics and independence from issuers on behalf of which the firm issues audit reports;

(ii) consultation within such firm on accounting and auditing questions;

(iii) supervision of audit work;

(iv) hiring, professional development, and advancement of personnel;

(v) the acceptance and continuation of engagements;

(vi) internal inspection; and

(vii) such other requirements as the Board may prescribe, subject to subsection (a)(1).

(3) AUTHORITY TO ADOPT OTHER STANDARDS.—

(A) IN GENERAL.—In carrying out this subsection, the Board—

(i) may adopt as its rules, subject to the terms of section 107, any portion of any statement of auditing standards or other professional standards that the Board determines satisfy the requirements of paragraph (1), and that were proposed by 1 or more professional groups of accountants that shall be designated or recognized by the Board, by rule, for such purpose, pursuant to this paragraph or 1 or more advisory groups convened pursuant to paragraph (4); and

(ii) notwithstanding clause (i), shall retain full authority to modify, supplement, revise, or subsequently amend, modify, or repeal, in whole or in part, any portion of any statement described in clause (i).

(B) INITIAL AND TRANSITIONAL STANDARDS.—The Board shall adopt standards described in subparagraph (A)(i) as initial or transitional standards, to the extent the Board determines necessary, prior to a determination of the Commission under section 101(d), and such standards shall be separately approved by the Commission at the time of that determination, without regard to the procedures required by section 107 that otherwise would apply to the approval of rules of the Board.

(4) ADVISORY GROUPS.—The Board shall convene, or authorize its staff to convene, such expert advisory groups as may be appropriate, which may include practicing accountants and other experts, as well as representatives of other

interested groups, subject to such rules as the Board may prescribe to prevent conflicts of interest, to make recommendations concerning the content (including proposed drafts) of auditing, quality control, ethics, independence, or other standards required to be established under this section.

(b) INDEPENDENCE STANDARDS AND RULES.—The Board shall establish such rules as may be necessary or appropriate in the public interest or for the protection of investors, to implement, or as authorized under, title II of this Act.

(c) COOPERATION WITH DESIGNATED PROFESSIONAL GROUPS OF ACCOUNTANTS AND ADVISORY GROUPS.—

(1) IN GENERAL.—The Board shall cooperate on an ongoing basis with professional groups of accountants designated under subsection (a)(3)(A) and advisory groups convened under subsection (a)(4) in the examination of the need for changes in any standards subject to its authority under subsection (a), recommend issues for inclusion on the agendas of such designated professional groups of accountants or advisory groups, and take such other steps as it deems appropriate to increase the effectiveness of the standard setting process.

(2) BOARD RESPONSES.—The Board shall respond in a timely fashion to requests from designated professional groups of accountants and advisory groups referred to in paragraph (1) for any changes in standards over which the Board has authority.

(d) EVALUATION OF STANDARD SETTING PROCESS.—The Board shall include in the annual

report required by section 101(h) the results of its standard setting responsibilities during the period to which the report relates, including a discussion of the work of the Board with any designated professional groups of accountants and advisory groups described in paragraphs (3)(A) and (4) of subsection (a), and its pending issues agenda for future standard setting projects.

§ 104, 15 U.S.C. § 7214. Inspections of Registered Public Accounting Firms.

(a) IN GENERAL.—The Board shall conduct a continuing program of inspections to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with this Act, the rules of the Board, the rules of the Commission, or professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers.

(b) INSPECTION FREQUENCY.—

(1) IN GENERAL.—Subject to paragraph (2), inspections required by this section shall be conducted—

(A) annually with respect to each registered public accounting firm that regularly provides audit reports for more than 100 issuers; and

(B) not less frequently than once every 3 years with respect to each registered public accounting firm that regularly provides audit reports for 100 or fewer issuers.

(2) ADJUSTMENTS TO SCHEDULES.—The Board may, by rule, adjust the inspection schedules set under paragraph (1) if the Board finds that different inspection schedules are

consistent with the purposes of this Act, the public interest, and the protection of investors. The Board may conduct special inspections at the request of the Commission or upon its own motion.

(c) PROCEDURES.—The Board shall, in each inspection under this section, and in accordance with its rules for such inspections—

(1) identify any act or practice or omission to act by the registered public accounting firm, or by any associated person thereof, revealed by such inspection that may be in violation of this Act, the rules of the Board, the rules of the Commission, the firm's own quality control policies, or professional standards;

(2) report any such act, practice, or omission, if appropriate, to the Commission and each appropriate State regulatory authority; and

(3) begin a formal investigation or take disciplinary action, if appropriate, with respect to any such violation, in accordance with this Act and the rules of the Board.

(d) CONDUCT OF INSPECTIONS.—In conducting an inspection of a registered public accounting firm under this section, the Board shall—

(1) inspect and review selected audit and review engagements of the firm (which may include audit engagements that are the subject of ongoing litigation or other controversy between the firm and 1 or more third parties), performed at various offices and by various associated persons of the firm, as selected by the Board;

(2) evaluate the sufficiency of the quality control system of the firm, and the manner of the

documentation and communication of that system by the firm; and

(3) perform such other testing of the audit, supervisory, and quality control procedures of the firm as are necessary or appropriate in light of the purpose of the inspection and the responsibilities of the Board.

(e) RECORD RETENTION.—The rules of the Board may require the retention by registered public accounting firms for inspection purposes of records whose retention is not otherwise required by section 103 or the rules issued thereunder.

(f) PROCEDURES FOR REVIEW.—The rules of the Board shall provide a procedure for the review of and response to a draft inspection report by the registered public accounting firm under inspection. The Board shall take such action with respect to such response as it considers appropriate (including revising the draft report or continuing or supplementing its inspection activities before issuing a final report), but the text of any such response, appropriately redacted to protect information reasonably identified by the accounting firm as confidential, shall be attached to and made part of the inspection report.

(g) REPORT.—A written report of the findings of the Board for each inspection under this section, subject to subsection (h), shall be—

(1) transmitted, in appropriate detail, to the Commission and each appropriate State regulatory authority, accompanied by any letter or comments by the Board or the inspector, and any letter of response from the registered public accounting firm; and

(2) made available in appropriate detail to the public (subject to section 105(b)(5)(A), and to the protection of such confidential and proprietary information as the Board may determine to be appropriate, or as may be required by law), except that no portions of the inspection report that deal with criticisms of or potential defects in the quality control systems of the firm under inspection shall be made public if those criticisms or defects are addressed by the firm, to the satisfaction of the Board, not later than 12 months after the date of the inspection report.

(h) INTERIM COMMISSION REVIEW.—

(1) REVIEWABLE MATTERS.—A registered public accounting firm may seek review by the Commission, pursuant to such rules as the Commission shall promulgate, if the firm—

(A) has provided the Board with a response, pursuant to rules issued by the Board under subsection (f), to the substance of particular items in a draft inspection report, and disagrees with the assessments contained in any final report prepared by the Board following such response; or

(B) disagrees with the determination of the Board that criticisms or defects identified in an inspection report have not been addressed to the satisfaction of the Board within 12 months of the date of the inspection report, for purposes of subsection (g)(2).

(2) TREATMENT OF REVIEW.—Any decision of the Commission with respect to a review under paragraph (1) shall not be reviewable under section 25 of the Securities Exchange Act of 1934 (15

U.S.C. 78y), or deemed to be "final agency action" for purposes of section 704 of title 5, United States Code.

(3) TIMING.—Review under paragraph (1) may be sought during the 30-day period following the date of the event giving rise to the review under subparagraph (A) or (B) of paragraph (1).

§ 105, 15 U.S.C. § 7215. Investigations and Disciplinary Proceedings.

(a) IN GENERAL.—The Board shall establish, by rule, subject to the requirements of this section, fair procedures for the investigation and disciplining of registered public accounting firms and associated persons of such firms.

(b) INVESTIGATIONS.—

(1) AUTHORITY.—In accordance with the rules of the Board, the Board may conduct an investigation of any act or practice, or omission to act, by a registered public accounting firm, any associated person of such firm, or both, that may violate any provision of this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under this Act, or professional standards, regardless of how the act, practice, or omission is brought to the attention of the Board.

(2) TESTIMONY AND DOCUMENT PRODUCTION.—In addition to such other actions as the Board determines to be necessary or appropriate, the rules of the Board may—

(A) require the testimony of the firm or of any person associated with a registered public accounting firm, with respect to any matter that the Board considers relevant or material to an investigation;

(B) require the production of audit work papers and any other document or information in the possession of a registered public accounting firm or any associated person thereof, wherever domiciled, that the Board considers relevant or material to the investigation, and may inspect the books and records of such firm or associated person to verify the accuracy of any documents or information supplied;

(C) request the testimony of, and production of any document in the possession of, any other person, including any client of a registered public accounting firm that the Board considers relevant or material to an investigation under this section, with appropriate notice, subject to the needs of the investigation, as permitted under the rules of the Board; and

(D) provide for procedures to seek issuance by the Commission, in a manner established by the Commission, of a subpoena to require the testimony of, and production of any document in the possession of, any person, including any client of a registered public accounting firm, that the Board considers relevant or material to an investigation under this section.

(3) NONCOOPERATION WITH INVESTIGATIONS. –

(A) IN GENERAL.—If a registered public accounting firm or any associated person thereof

refuses to testify, produce documents, or otherwise cooperate with the Board in connection with an investigation under this section, the Board may—

(i) suspend or bar such person from being associated with a registered public accounting firm, or require the registered public accounting firm to end such association;

(ii) suspend or revoke the registration of the public accounting firm; and

(iii) invoke such other lesser sanctions as the Board considers appropriate, and as specified by rule of the Board.

(B) PROCEDURE.—Any action taken by the Board under this paragraph shall be subject to the terms of section 107(c).

(4) COORDINATION AND REFERRAL OF INVESTIGATIONS.—

(A) COORDINATION.—The Board shall notify the Commission of any pending Board investigation involving a potential violation of the securities laws, and thereafter coordinate its work with the work of the Commission's Division of Enforcement, as necessary to protect an ongoing Commission investigation.

(B) REFERRAL.—The Board may refer an investigation under this section—

(i) to the Commission;

(ii) to any other Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6809)), in the case of an investigation that concerns an audit report for

an institution that is subject to the jurisdiction of such regulator; and

(iii) at the direction of the Commission, to—

(I) the Attorney General of the United States;

(II) the attorney general of 1 or more States; and

(III) the appropriate State regulatory authority.

(5) USE OF DOCUMENTS.—

(A) CONFIDENTIALITY.—Except as provided in subparagraph (B), all documents and information prepared or received by or specifically for the Board, and deliberations of the Board and its employees and agents, in connection with an inspection under section 104 or with an investigation under this section, shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process) in any proceeding in any Federal or State court or administrative agency, and shall be exempt from disclosure, in the hands of an agency or establishment of the Federal Government, under the Freedom of Information Act (5 U.S.C. 552a), or otherwise, unless and until presented in connection with a public proceeding or released in accordance with subsection (c).

(B) AVAILABILITY TO GOVERNMENT AGENCIES.—Without the loss of its status as confidential and privileged in the hands of the Board, all information referred to in subparagraph (A) may—

(i) be made available to the Commission; and

(ii) in the discretion of the Board, when determined by the Board to be necessary to accomplish the purposes of this Act or to protect investors, be made available to—

(I) the Attorney General of the United States;

(II) the appropriate Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6809)), other than the Commission, with respect to an audit report for an institution subject to the jurisdiction of such regulator;

(III) State attorneys general in connection with any criminal investigation; and

(IV) any appropriate State regulatory authority,

each of which shall maintain such information as confidential and privileged.

(6) IMMUNITY.—Any employee of the Board engaged in carrying out an investigation under this Act shall be immune from any civil liability arising out of such investigation in the same manner and to the same extent as an employee of the Federal Government in similar circumstances.

(c) DISCIPLINARY PROCEDURES.—

(1) NOTIFICATION; RECORDKEEPING.—The rules of the Board shall provide that in any proceeding by the Board to determine whether a registered public accounting firm, or an associated person thereof, should be disciplined, the Board shall—

(A) bring specific charges with respect to the firm or associated person;

(B) notify such firm or associated person of, and provide to the firm or associated person an opportunity to defend against, such charges; and

(C) keep a record of the proceedings.

(2) PUBLIC HEARINGS.—Hearings under this section shall not be public, unless otherwise ordered by the Board for good cause shown, with the consent of the parties to such hearing.

(3) SUPPORTING STATEMENT.—A determination by the Board to impose a sanction under this subsection shall be supported by a statement setting forth—

(A) each act or practice in which the registered public accounting firm, or associated person, has engaged (or omitted to engage), or that forms a basis for all or a part of such sanction;

(B) the specific provision of this Act, the securities laws, the rules of the Board, or professional standards which the Board determines has been violated; and

(C) the sanction imposed, including a justification for that sanction.

(4) SANCTIONS.—If the Board finds, based on all of the facts and circumstances, that a registered public accounting firm or associated person thereof has engaged in any act or practice, or omitted to act, in violation of this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under this Act, or professional standards, the Board may impose such disciplinary

or remedial sanctions as it determines appropriate, subject to applicable limitations under paragraph (5), including—

(A) temporary suspension or permanent revocation of registration under this title;

(B) temporary or permanent suspension or bar of a person from further association with any registered public accounting firm;

(C) temporary or permanent limitation on the activities, functions, or operations of such firm or person (other than in connection with required additional professional education or training);

(D) a civil money penalty for each such violation, in an amount equal to—

(i) not more than $100,000 for a natural person or $2,000,000 for any other person; and

(ii) in any case to which paragraph (5) applies, not more than $750,000 for a natural person or $15,000,000 for any other person;

(E) censure;

(F) required additional professional education or training; or

(G) any other appropriate sanction provided for in the rules of the Board.

(5) INTENTIONAL OR OTHER KNOWING CONDUCT.—The sanctions and penalties described in subparagraphs (A) through (C) and (D)(ii) of paragraph (4) shall only apply to—

(A) intentional or knowing conduct, including reckless conduct, that results in violation of the applicable statutory, regulatory, or professional standard; or

(B) repeated instances of negligent conduct, each resulting in a violation of the applicable statutory, regulatory, or professional standard.

(6) FAILURE TO SUPERVISE.—

(A) IN GENERAL.—The Board may impose sanctions under this section on a registered accounting firm or upon the supervisory personnel of such firm, if the Board finds that—

(i) the firm has failed reasonably to supervise an associated person, either as required by the rules of the Board relating to auditing or quality control standards, or otherwise, with a view to preventing violations of this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission under this Act, or professional standards; and

(ii) such associated person commits a violation of this Act, or any of such rules, laws, or standards.

(B) RULE OF CONSTRUCTION.—No associated person of a registered public accounting firm shall be deemed to have failed reasonably to supervise any other person for purposes of subparagraph (A), if—

(i) there have been established in and for that firm procedures, and a system for applying such procedures, that comply with applicable rules of the Board and that would reasonably be expected to prevent and detect any such violation by such associated person; and

(ii) such person has reasonably discharged the duties and obligations incumbent upon that person by reason of such procedures and system, and had no reasonable cause to believe that such procedures and system were not being complied with.

(7) EFFECT OF SUSPENSION.—

(A) ASSOCIATION WITH A PUBLIC ACCOUNTING FIRM.—It shall be unlawful for any person that is suspended or barred from being associated with a registered public accounting firm under this subsection willfully to become or remain associated with any registered public accounting firm, or for any registered public accounting firm that knew, or, in the exercise of reasonable care should have known, of the suspension or bar, to permit such an association, without the consent of the Board or the Commission.

(B) ASSOCIATION WITH AN ISSUER.—It shall be unlawful for any person that is suspended or barred from being associated with an issuer under this subsection willfully to become or remain associated with any issuer in an accountancy or a financial management capacity, and for any issuer that knew, or in the exercise of reasonable care should have known, of such suspension or bar, to permit such an association, without the consent of the Board or the Commission.

(d) REPORTING OF SANCTIONS.—

(1) RECIPIENTS.—If the Board imposes a disciplinary sanction, in accordance with this section, the Board shall report the sanction to—

(A) the Commission;

(B) any appropriate State regulatory authority or any foreign accountancy licensing board with which such firm or person is licensed or certified; and

(C) the public (once any stay on the imposition of such sanction has been lifted).

(2) CONTENTS.—The information reported under paragraph (1) shall include—

(A) the name of the sanctioned person;

(B) a description of the sanction and the basis for its imposition; and

(C) such other information as the Board deems appropriate.

(e) STAY OF SANCTIONS.—

(1) IN GENERAL.—Application to the Commission for review, or the institution by the Commission of review, of any disciplinary action of the Board shall operate as a stay of any such disciplinary action, unless and until the Commission orders (summarily or after notice and opportunity for hearing on the question of a stay, which hearing may consist solely of the submission of affidavits or presentation of oral arguments) that no such stay shall continue to operate.

(2) EXPEDITED PROCEDURES.—The Commission shall establish for appropriate cases an expedited procedure for consideration and determination of the question of the duration of a stay pending review of any disciplinary action of the Board under this subsection.

§ 106, 15 U.S.C. § 7216. Foreign Public Accounting Firms.

(a) APPLICABILITY TO CERTAIN FOREIGN FIRMS.—

(1) IN GENERAL.—Any foreign public accounting firm that prepares or furnishes an audit report with respect to any issuer, shall be subject to this Act and the rules of the Board and the Commission issued under this Act, in the same manner and to the same extent as a public accounting firm that is organized and operates under the laws of the United States or any State, except that registration pursuant to section 102 shall not by itself provide a basis for subjecting such a foreign public accounting firm to the jurisdiction of the Federal or State courts, other than with respect to controversies between such firms and the Board.

(2) BOARD AUTHORITY.—The Board may, by rule, determine that a foreign public accounting firm (or a class of such firms) that does not issue audit reports nonetheless plays such a substantial role in the preparation and furnishing of such reports for particular issuers, that it is necessary or appropriate, in light of the purposes of this Act and in the public interest or for the protection of investors, that such firm (or class of firms) should be treated as a public accounting firm (or firms) for purposes of registration under, and oversight by the Board in accordance with, this title.

(b) PRODUCTION OF AUDIT WORKPAPERS.—

(1) CONSENT BY FOREIGN FIRMS.—If a foreign public accounting firm issues an opinion or otherwise performs material services upon which a registered public accounting firm relies in issuing

all or part of any audit report or any opinion contained in an audit report, that foreign public accounting firm shall be deemed to have consented—

(A) to produce its audit workpapers for the Board or the Commission in connection with any investigation by either body with respect to that audit report; and

(B) to be subject to the jurisdiction of the courts of the United States for purposes of enforcement of any request for production of such workpapers.

(2) CONSENT BY DOMESTIC FIRMS.—A registered public accounting firm that relies upon the opinion of a foreign public accounting firm, as described in paragraph (1), shall be deemed—

(A) to have consented to supplying the audit workpapers of that foreign public accounting firm in response to a request for production by the Board or the Commission; and

(B) to have secured the agreement of that foreign public accounting firm to such production, as a condition of its reliance on the opinion of that foreign public accounting firm.

(c) EXEMPTION AUTHORITY.—The Commission, and the Board, subject to the approval of the Commission, may, by rule, regulation, or order, and as the Commission (or Board) determines necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions exempt any foreign public accounting firm, or any class of such firms, from any provision of this Act or the rules of the Board or the Commission issued under this Act.

(d) DEFINITION.—In this section, the term "foreign public accounting firm" means a public accounting firm that is organized and operates under the laws of a foreign government or political subdivision thereof.

§ 107, 15 U.S.C. § 7217. Commission Oversight of the Board.

(a) GENERAL OVERSIGHT RESPONSIBILITY.—The Commission shall have oversight and enforcement authority over the Board, as provided in this Act. The provisions of section 17(a)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(a)(1)), and of section 17(b)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(b)(1)) shall apply to the Board as fully as if the Board were a "registered securities association" for purposes of those sections 17(a)(1) and 17(b)(1).

(b) RULES OF THE BOARD.—

(1) DEFINITION.—In this section, the term "proposed rule" means any proposed rule of the Board, and any modification of any such rule.

(2) PRIOR APPROVAL REQUIRED.—No rule of the Board shall become effective without prior approval of the Commission in accordance with this section, other than as provided in section 103(a)(3)(B) with respect to initial or transitional standards.

(3) APPROVAL CRITERIA.—The Commission shall approve a proposed rule, if it finds that the rule is consistent with the requirements of this Act and the securities laws, or is necessary or appropriate in the public interest or for the protection of investors.

(4) PROPOSED RULE PROCEDURES.—The provisions of paragraphs (1) through (3) of section 19(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78s(b)) shall govern the proposed rules of the Board, as fully as if the Board were a "registered securities association" for purposes of that section 19(b), except that, for purposes of this paragraph—

(A) the phrase "consistent with the requirements of this title and the rules and regulations thereunder applicable to such organization" in section 19(b)(2) of that Act shall be deemed to read "consistent with the requirements of title I of the Sarbanes-Oxley Act of 2002, and the rules and regulations issued thereunder applicable to such organization, or as necessary or appropriate in the public interest or for the protection of investors"; and

(B) the phrase "otherwise in furtherance of the purposes of this title" in section 19(b)(3)(C) of that Act shall be deemed to read "otherwise in furtherance of the purposes of title I of the Sarbanes-Oxley Act of 2002".

(5) COMMISSION AUTHORITY TO AMEND RULES OF THE BOARD.—The provisions of section 19(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78s(c)) shall govern the abrogation, deletion, or addition to portions of the rules of the Board by the Commission as fully as if the Board were a "registered securities association" for purposes of that section 19(c), except that the phrase "to conform its rules to the requirements of this title and the rules and regulations thereunder applicable to such organization, or otherwise in

furtherance of the purposes of this title" in section 19(c) of that Act shall, for purposes of this paragraph, be deemed to read "to assure the fair administration of the Public Company Accounting Oversight Board, conform the rules promulgated by that Board to the requirements of title I of the Sarbanes-Oxley Act of 2002, or otherwise further the purposes of that Act, the securities laws, and the rules and regulations thereunder applicable to that Board".

(c) COMMISSION REVIEW OF DISCIPLINARY ACTION TAKEN BY THE BOARD.—

(1) NOTICE OF SANCTION.—The Board shall promptly file notice with the Commission of any final sanction on any registered public accounting firm or on any associated person thereof, in such form and containing such information as the Commission, by rule, may prescribe.

(2) REVIEW OF SANCTIONS.—The provisions of sections 19(d)(2) and 19(e)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78s (d)(2) and (e)(1)) shall govern the review by the Commission of final disciplinary sanctions imposed by the Board (including sanctions imposed under section 105(b)(3) of this Act for noncooperation in an investigation of the Board), as fully as if the Board were a self-regulatory organization and the Commission were the appropriate regulatory agency for such organization for purposes of those sections 19(d)(2) and 19(e)(1), except that, for purposes of this paragraph—

(A) section 105(e) of this Act (rather than that section 19(d)(2)) shall govern the extent to which application for, or institution by the Commission

on its own motion of, review of any disciplinary action of the Board operates as a stay of such action;

(B) references in that section 19(e)(1) to "members" of such an organization shall be deemed to be references to registered public accounting firms;

(C) the phrase "consistent with the purposes of this title" in that section 19(e)(1) shall be deemed to read "consistent with the purposes of this title and title I of the Sarbanes-Oxley Act of 2002";

(D) references to rules of the Municipal Securities Rulemaking Board in that section 19(e)(1) shall not apply; and

(E) the reference to section 19(e)(2) of the Securities Exchange Act of 1934 shall refer instead to section 107(c)(3) of this Act.

(3) COMMISSION MODIFICATION AUTHORITY.—The Commission may enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board upon a registered public accounting firm or associated person thereof, if the Commission, having due regard for the public interest and the protection of investors, finds, after a proceeding in accordance with this subsection, that the sanction—

(A) is not necessary or appropriate in furtherance of this Act or the securities laws; or

(B) is excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed.

(d) CENSURE OF THE BOARD; OTHER SANCTIONS.—

(1) RESCISSION OF BOARD AUTHORITY.—The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this Act and the securities laws, may relieve the Board of any responsibility to enforce compliance with any provision of this Act, the securities laws, the rules of the Board, or professional standards.

(2) CENSURE OF THE BOARD; LIMITATIONS.—The Commission may, by order, as it determines necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act or the securities laws, censure or impose limitations upon the activities, functions, and operations of the Board, if the Commission finds, on the record, after notice and opportunity for a hearing, that the Board—

(A) has violated or is unable to comply with any provision of this Act, the rules of the Board, or the securities laws; or

(B) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by a registered public accounting firm or an associated person thereof.

(3) CENSURE OF BOARD MEMBERS; REMOVAL FROM OFFICE.—The Commission may, as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act or the securities laws, remove from office or censure any member of the Board, if the

Commission finds, on the record, after notice and opportunity for a hearing, that such member—

(A) has willfully violated any provision of this Act, the rules of the Board, or the securities laws;

(B) has willfully abused the authority of that member; or

(C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.

§ 108, 15 U.S.C. § 7218. Accounting Standards.

(a) AMENDMENT TO SECURITIES ACT OF 1933.—Section 19 of the Securities Act of 1933 (15 U.S.C. 77s) is amended—

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(2) by inserting after subsection (a) the following:

"(b) RECOGNITION OF ACCOUNTING STANDARDS.—

"(1) IN GENERAL.—In carrying out its authority under subsection (a) and under section 13(b) of the Securities Exchange Act of 1934, the Commission may recognize, as 'generally accepted' for purposes of the securities laws, any accounting principles established by a standard setting body—

"(A) that—

"(i) is organized as a private entity;

"(ii) has, for administrative and operational purposes, a board of trustees (or equivalent body) serving in the public interest, the majority of whom are not, concurrent with

their service on such board, and have not been during the 2-year period preceding such service, associated persons of any registered public accounting firm;

"(iii) is funded as provided in section 109 of the Sarbanes-Oxley Act of 2002;

"(iv) has adopted procedures to ensure prompt consideration, by majority vote of its members, of changes to accounting principles necessary to reflect emerging accounting issues and changing business practices; and

"(v) considers, in adopting accounting principles, the need to keep standards current in order to reflect changes in the business environment, the extent to which international convergence on high quality accounting standards is necessary or appropriate in the public interest and for the protection of investors; and "(B) that the Commission determines has the capacity to assist the Commission in fulfilling the requirements of subsection (a) and section 13(b) of the Securities Exchange Act of 1934, because, at a minimum, the standard setting body is capable of improving the accuracy and effectiveness of financial reporting and the protection of investors under the securities laws.

"(2) ANNUAL REPORT.—A standard setting body described in paragraph (1) shall submit an annual report to the Commission and the public, containing audited financial statements of that standard setting body.".

(b) COMMISSION AUTHORITY.—The Commission shall promulgate such rules and regulations to carry

out section 19(b) of the Securities Act of 1933, as added by this section, as it deems necessary or appropriate in the public interest or for the protection of investors.

(c) NO EFFECT ON COMMISSION POWERS.—Nothing in this Act, including this section and the amendment made by this section, shall be construed to impair or limit the authority of the Commission to establish accounting principles or standards for purposes of enforcement of the securities laws.

(d) STUDY AND REPORT ON ADOPTING PRINCIPLES-BASED ACCOUNTING.—

(1) STUDY.—

(A) IN GENERAL.—The Commission shall conduct a study on the adoption by the United States financial reporting system of a principles-based accounting system.

(B) STUDY TOPICS.—The study required by subparagraph (A) shall include an examination of—

(i) the extent to which principles-based accounting and financial reporting exists in the United States;

(ii) the length of time required for change from a rules-based to a principles-based financial reporting system;

(iii) the feasibility of and proposed methods by which a principles-based system may be implemented; and

(iv) a thorough economic analysis of the implementation of a principles-based system.

(2) REPORT.—Not later than 1 year after the date of enactment of this Act, the Commission shall submit a report on the results of the study required by paragraph (1) to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.

§ 109, 15 U.S.C. § 7219. Funding.

(a) IN GENERAL.—The Board, and the standard setting body designated pursuant to section 19(b) of the Securities Act of 1933, as amended by section 108, shall be funded as provided in this section.

(b) ANNUAL BUDGETS.—The Board and the standard setting body referred to in subsection (a) shall each establish a budget for each fiscal year, which shall be reviewed and approved according to their respective internal procedures not less than 1 month prior to the commencement of the fiscal year to which the budget pertains (or at the beginning of the Board's first fiscal year, which may be a short fiscal year). The budget of the Board shall be subject to approval by the Commission. The budget for the first fiscal year of the Board shall be prepared and approved promptly following the appointment of the initial five Board members, to permit action by the Board of the organizational tasks contemplated by section 101(d).

(c) SOURCES AND USES OF FUNDS.—

(1) RECOVERABLE BUDGET EXPENSES.—The budget of the Board (reduced by any registration or annual fees received under section 102(e) for the year preceding the year for which the budget is being computed), and all of the budget of the standard setting body referred to in subsection (a),

for each fiscal year of each of those 2 entities, shall be payable from annual accounting support fees, in accordance with subsections (d) and (e). Accounting support fees and other receipts of the Board and of such standard- setting body shall not be considered public monies of the United States.

(2) FUNDS GENERATED FROM THE COLLECTION OF MONETARY PENALTIES.—Subject to the availability in advance in an appropriations Act, and notwithstanding subsection (i), all funds collected by the Board as a result of the assessment of monetary penalties shall be used to fund a merit scholarship program for undergraduate and graduate students enrolled in accredited accounting degree programs, which program is to be administered by the Board or by an entity or agent identified by the Board.

(d) ANNUAL ACCOUNTING SUPPORT FEE FOR THE BOARD.—

(1) ESTABLISHMENT OF FEE.—The Board shall establish, with the approval of the Commission, a reasonable annual accounting support fee (or a formula for the computation thereof), as may be necessary or appropriate to establish and maintain the Board. Such fee may also cover costs incurred in the Board's first fiscal year (which may be a short fiscal year), or may be levied separately with respect to such short fiscal year.

(2) ASSESSMENTS.—The rules of the Board under paragraph (1) shall provide for the equitable allocation, assessment, and collection by the Board (or an agent appointed by the Board) of the fee established under paragraph (1), among issuers, in accordance with subsection (g), allowing for

differentiation among classes of issuers, as appropriate.

(e) ANNUAL ACCOUNTING SUPPORT FEE FOR STANDARD SETTING BODY.—The annual accounting support fee for the standard setting body referred to in subsection (a)—

(1) shall be allocated in accordance with subsection (g), and assessed and collected against each issuer, on behalf of the standard setting body, by 1 or more appropriate designated collection agents, as may be necessary or appropriate to pay for the budget and provide for the expenses of that standard setting body, and to provide for an independent, stable source of funding for such body, subject to review by the Commission; and

(2) may differentiate among different classes of issuers.

(f) LIMITATION ON FEE.—The amount of fees collected under this section for a fiscal year on behalf of the Board or the standards setting body, as the case may be, shall not exceed the recoverable budget expenses of the Board or body, respectively (which may include operating, capital, and accrued items), referred to in subsection (c)(1).

(g) ALLOCATION OF ACCOUNTING SUPPORT FEES AMONG ISSUERS.—Any amount due from issuers (or a particular class of issuers) under this section to fund the budget of the Board or the standard setting body referred to in subsection (a) shall be allocated among and payable by each issuer (or each issuer in a particular class, as applicable) in an amount equal to the total of such amount, multiplied by a fraction—

(1) the numerator of which is the average monthly equity market capitalization of the issuer for the 12-month period immediately preceding the beginning of the fiscal year to which such budget relates; and

(2) the denominator of which is the average monthly equity market capitalization of all such issuers for such 12-month period.

(h) CONFORMING AMENDMENTS.—Section 13(b)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(b)(2)) is amended—

(1) in subparagraph (A), by striking "and" at the end; and

(2) in subparagraph (B), by striking the period at the end and inserting the following: "; and

"(C) notwithstanding any other provision of law, pay the allocable share of such issuer of a reasonable annual accounting support fee or fees, determined in accordance with section 109 of the Sarbanes-Oxley Act of 2002.".

(i) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to render either the Board, the standard setting body referred to in subsection (a), or both, subject to procedures in Congress to authorize or appropriate public funds, or to prevent such organization from utilizing additional sources of revenue for its activities, such as earnings from publication sales, provided that each additional source of revenue shall not jeopardize, in the judgment of the Commission, the actual and perceived independence of such organization.

(j) START-UP EXPENSES OF THE BOARD.—From the unexpended balances of the appropriations to the

Commission for fiscal year 2003, the Secretary of the Treasury is authorized to advance to the Board not to exceed the amount necessary to cover the expenses of the Board during its first fiscal year (which may be a short fiscal year).

The Securities Exchange Act of 1934, ch. 404, 48 Stat. 898 (codified at 15 U.S.C. §§ 78a *et seq.*)

§ 19, 15 U.S.C. § 78s. Registration, Responsibilities, and Oversight of Self-Regulatory Organizations.

* * * * *

(b) Proposed rule changes; notice; proceedings

(1) Each self-regulatory organization shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization (hereinafter in this subsection collectively referred to as a "proposed rule change") accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, upon the filing of any proposed rule change, publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit written data, views, and arguments concerning such proposed rule change. No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection.

(2) Within thirty-five days of the date of publication of notice of the filing of a proposed rule change in accordance with paragraph (1) of this subsection, or within such longer period as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall—

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved. Such proceedings shall include notice of the grounds for disapproval under consideration and opportunity for hearing and be concluded within one hundred eighty days of the date of publication of notice of the filing of the proposed rule change. At the conclusion of such proceedings the Commission, by order, shall approve or disapprove such proposed rule change. The Commission may extend the time for conclusion of such proceedings for up to sixty days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the self-regulatory organization consents.

The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this chapter and the rules and regulations thereunder applicable to such organization. The Commission shall disapprove a proposed rule change of a self-regulatory

organization if it does not make such finding. The Commission shall not approve any proposed rule change prior to the thirtieth day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding.

(3) (A) Notwithstanding the provisions of paragraph (2) of this subsection, a proposed rule change may take effect upon filing with the Commission if designated by the self-regulatory organization as (i) constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization, (ii) establishing or changing a due, fee, or other charge imposed by the self-regulatory organization, or (iii) concerned solely with the administration of the self-regulatory organization or other matters which the Commission, by rule, consistent with the public interest and the purposes of this subsection, may specify as without the provisions of such paragraph (2).

(B) Notwithstanding any other provision of this subsection, a proposed rule change may be put into effect summarily if it appears to the Commission that such action is necessary for the protection of investors, the maintenance of fair and orderly markets, or the safeguarding of securities or funds. Any proposed rule change so put into effect shall be filed promptly thereafter in accordance with the provisions of paragraph (1) of this subsection.

(C) Any proposed rule change of a self-regulatory organization which has taken effect pursuant to

subparagraph (A) or (B) of this paragraph may be enforced by such organization to the extent it is not inconsistent with the provisions of this chapter, the rules and regulations thereunder, and applicable Federal and State law. At any time within sixty days of the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) of this subsection, the Commission summarily may abrogate the change in the rules of the self-regulatory organization made thereby and require that the proposed rule change be refiled in accordance with the provisions of paragraph (1) of this subsection and reviewed in accordance with the provisions of paragraph (2) of this subsection, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter. Commission action pursuant to the preceding sentence shall not affect the validity or force of the rule change during the period it was in effect and shall not be reviewable under section 78y of this title nor deemed to be "final agency action" for purposes of section 704 of Title 5.

* * * * *

(c) Amendment by Commission of rules of self-regulatory organizations

The Commission, by rule, may abrogate, add to, and delete from (hereinafter in this subsection collectively referred to as "amend") the rules of a self-regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory

organization, to conform its rules to requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter, in the following manner:

(1) The Commission shall notify the self-regulatory organization and publish notice of the proposed rulemaking in the Federal Register. The notice shall include the text of the proposed amendment to the rules of the self-regulatory organization and a statement of the Commission's reasons, including any pertinent facts, for commencing such proposed rulemaking.

(2) The Commission shall give interested persons an opportunity for the oral presentation of data, views, and arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation.

(3) A rule adopted pursuant to this subsection shall incorporate the text of the amendment to the rules of the self-regulatory organization and a statement of the Commission's basis for and purpose in so amending such rules. This statement shall include an identification of any facts on which the Commission considers its determination so to amend the rules of the self-regulatory agency to be based, including the reasons for the Commission's conclusions as to any of such facts which were disputed in the rulemaking.

(4) (A) Except as provided in paragraphs (1) through (3) of this subsection, rulemaking under this subsection shall be in accordance with the procedures specified in section 553 of Title 5 for rulemaking not on the record.

(B) Nothing in this subsection shall be construed to impair or limit the Commission's power to make, or to modify or alter the procedures the Commission may follow in making, rules and regulations pursuant to any other authority under this chapter.

(C) Any amendment to the rules of a self-regulatory organization made by the Commission pursuant to this subsection shall be considered for all purposes of this chapter to be part of the rules of such self-regulatory organization and shall not be considered to be a rule of the Commission.

(5) With respect to rules described in subsection (b)(5) of this section, the Commission shall consult with and consider the views of the Secretary of the Treasury before abrogating, adding to, and deleting from such rules, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor.

(d) Notice of disciplinary action taken by self-regulatory organization against a member or participant; review of action by appropriate regulatory agency; procedure

(1) If any self-regulatory organization imposes any final disciplinary sanction on any member thereof or participant therein, denies membership or participation to any applicant, or prohibits or limits any person in respect to access to services offered by such organization or member thereof or if any self-regulatory organization (other than a registered clearing agency) imposes any final disciplinary sanction on any person associated with

a member or bars any person from becoming associated with a member, the self-regulatory organization shall promptly file notice thereof with the appropriate regulatory agency for the self-regulatory organization and (if other than the appropriate regulatory agency for the self-regulatory organization) the appropriate regulatory agency for such member, participant, applicant, or other person. The notice shall be in such form and contain such information as the appropriate regulatory agency for the self-regulatory organization, by rule, may prescribe as necessary or appropriate in furtherance of the purposes of this chapter.

(2) Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine. Application to such appropriate regulatory agency for review, or the institution of review by such appropriate regulatory agency on its own motion, shall not operate as a stay of such action unless such appropriate regulatory agency otherwise orders, summarily or after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments). Each appropriate regulatory agency

shall establish for appropriate cases an expedited procedure for consideration and determination of the question of a stay.

(3) The provisions of this subsection shall apply to an exchange registered pursuant to section 78f(g) of this title or a National securities association registered pursuant to section 78o-3(k) of this title only to the extent that such exchange or association imposes any final disciplinary sanction for

(A) a violation of the Federal securities laws or the rules and regulations thereunder; or

(B) a violation of a rule of such exchange or association, as to which a proposed change would be required to be filed under this section, except that, to the extent that the exchange or association rule violation relates to any account, agreement, contract, or transaction, this subsection shall apply only to the extent such violation involves a security futures product.

(e) Disposition of review; cancellation, reduction, or remission of sanction

(1) In any proceeding to review a final disciplinary sanction imposed by a self-regulatory organization on a member thereof or participant therein or a person associated with such a member, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction)—

(A) if the appropriate regulatory agency for such member, participant, or person associated with a

member finds that such member, participant, or person associated with a member has engaged in such acts or practices, or has omitted such acts, as the self-regulatory organization has found him to have engaged in or omitted, that such acts or practices, or omissions to act, are in violation of such provisions of this chapter, the rules or regulations thereunder, the rules of the self-regulatory organization, or, in the case of a registered securities association, the rules of the Municipal Securities Rulemaking Board as have been specified in the determination of the self-regulatory organization, and that such provisions are, and were applied in a manner, consistent with the purposes of this chapter, such appropriate regulatory agency, by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization, modify the sanction in accordance with paragraph (2) of this subsection, or remand to the self-regulatory organization for further proceedings; or

(B) if such appropriate regulatory agency does not make any such finding it shall, by order, set aside the sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.

(2) If the appropriate regulatory agency for a member, participant, or person associated with a member, having due regard for the public interest and the protection of investors, finds after a proceeding in accordance with paragraph (1) of this subsection that a sanction imposed by a self-

regulatory organization upon such member, participant, or person associated with a member imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter or is excessive or oppressive, the appropriate regulatory agency may cancel, reduce, or require the remission of such sanction.

* * * * *

§ 25, 15 U.S.C. § 78y. Court Review of Orders and Rules.

(a) Final Commission orders; persons aggrieved; petition; record; findings; affirmance, modification, enforcement, or setting aside of orders; remand to adduce additional evidence

(1) A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated by the Commission for that purpose. Thereupon the Commission shall file in the court the record on which the order complained of is entered, as provided in section 2112 of Title 28 and the Federal Rules of Appellate Procedure.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing

of the record, to affirm or modify and enforce or to set aside the order in whole or in part.

(4) The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

(5) If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers appropriate. If the case is remanded to the Commission, it shall file in the court a supplemental record containing any new evidence, any further or modified findings, and any new order.

(b) Commission rules; persons adversely affected; petition; record; affirmance, enforcement, or setting aside of rules; findings; transfer of proceedings

(1) A person adversely affected by a rule of the Commission promulgated pursuant to section 78f, 78i(h)(2), 78k, 78k-1, 78o(c)(5) or (6), 78o-3, 78q, 78q-1, or 78s of this title may obtain review of this rule in the United States Court of Appeals for the circuit in which he resides or has his principal place of business or for the District of Columbia Circuit, by filing in such court, within sixty days after the promulgation of the rule, a written petition requesting that the rule be set aside.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated for that

purpose. Thereupon, the Commission shall file in the court the rule under review and any documents referred to therein, the Commission's notice of proposed rulemaking and any documents referred to therein, all written submissions and the transcript of any oral presentations in the rulemaking, factual information not included in the foregoing that was considered by the Commission in the promulgation of the rule or proffered by the Commission as pertinent to the rule, the report of any advisory committee received or considered by the Commission in the rulemaking, and any other materials prescribed by the court.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the materials set forth in paragraph (2) of this subsection, to affirm and enforce or to set aside the rule.

(4) The findings of the Commission as to the facts identified by the Commission as the basis, in whole or in part, of the rule, if supported by substantial evidence, are conclusive. The court shall affirm and enforce the rule unless the Commission's action in promulgating the rule is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law.

(5) If proceedings have been instituted under this subsection in two or more courts of appeals with respect to the same rule, the Commission shall file

the materials set forth in paragraph (2) of this subsection in that court in which a proceeding was first instituted. The other courts shall thereupon transfer all such proceedings to the court in which the materials have been filed. For the convenience of the parties in the interest of justice that court may thereafter transfer all the proceedings to any other court of appeals.

(c) Objections not urged before Commission; stay of orders and rules; transfer of enforcement or review proceedings

(1) No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.

(2) The filing of a petition under this section does not operate as a stay of the Commission's order or rule. Until the court's jurisdiction becomes exclusive, the Commission may stay its order or rule pending judicial review if it finds that justice so requires. After the filing of a petition under this section, the court, on whatever conditions may be required and to the extent necessary to prevent irreparable injury, may issue all necessary and appropriate process to stay the order or rule or to preserve status or rights pending its review; but (notwithstanding section 705 of Title 5) no such process may be issued by the court before the filing of the record or the materials set forth in subsection (b)(2) of this section unless: (A) the Commission has denied a stay or failed to grant requested relief, (B) a reasonable period has expired since the filing of an application for a stay

without a decision by the Commission, or (C) there was reasonable ground for failure to apply to the Commission.

(3) When the same order or rule is the subject of one or more petitions for review filed under this section and an action for enforcement filed in a district court of the United States under section 78u(d) or (e) of this title, that court in which the petition or the action is first filed has jurisdiction with respect to the order or ruale to the exclusion of any other court, and thereupon all such proceedings shall be transferred to that court; but, for the convenience of the parties in the interest of justice, that court may thereafter transfer all the proceedings to any other court of appeals or district court of the United States, whether or not a petition for review or an action for enforcement was originally filed in the transferee court. The scope of review by a district court under section 78u(d) or (e) of this title is in all cases the same as by a court of appeals under this section.

* * * * *

United States Constitution, Article II, Section 2

* * * * *

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * * * *

OPPOSITION BRIEF

(5)

No. 08-861

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,
Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, *ET AL.*

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QUESTIONS PRESENTED

The Sarbanes-Oxley Act of 2002 established the Public Company Accounting Oversight Board ("Board") and subjected it to the comprehensive oversight of the Securities and Exchange Commission ("SEC"). The questions presented are:

1. Whether petitioners' failure to invoke the exclusive statutory review procedures deprives this Court of jurisdiction.

2. Whether the court of appeals correctly held that Board members are inferior officers under the Appointments Clause because they are "directed and supervised" by the SEC.

3. Whether the court of appeals correctly held that the SEC is a "department" and that the Commissioners collectively constitute its "head" within the meaning of the Appointments Clause.

4. Whether the court of appeals correctly held that the Sarbanes-Oxley Act is consistent with separation-of-powers principles because—given the SEC's pervasive control over the Board and the President's oversight of the SEC—the statute preserves the President's ability to ensure faithful execution of the laws.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties identified in the petition, Board members Bill Gradison, Daniel L. Goelzer, and Charles Niemeier were defendants in their official capacities in the district court and were appellees in the court of appeals. Former Board member Kayla J. Gillan was a defendant in her official capacity in the district court and was originally an appellee in the court of appeals. Following the conclusion of Ms. Gillan's service to the Board, however, she was dismissed from the case upon stipulation of the parties on April 14, 2008.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the Public Company Accounting Oversight Board states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

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IN THE

Supreme Court of the United States

NO. 08-861

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,
Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioners attack a statute that bears no resemblance to the legislation Congress actually enacted. While petitioners assert that the Public Company Accounting Oversight Board ("Board") has massive, unchecked powers, the court of appeals correctly held that the Securities and Exchange Commission ("SEC") has "pervasive"—indeed, "extraordinary"—control over every Board function. Pet. App. 7a, 30a-31a. That control is fatal to petitioners' claims: It both renders Board members inferior officers under the Appointments Clause and preserves for the

President the same ability to ensure faithful execution of the laws that he has over any other area under the SEC's jurisdiction.

Petitioners alternately ignore the express oversight provisions of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or "the Act") and invite the Court to adopt unreasonable constructions that vastly understate the SEC's control. But once the Act is properly construed—as the court of appeals construed it—petitioners' constitutional complaints evaporate. Petitioners reject the court of appeals' construction of the SEC's statutory oversight authority. If the court of appeals' construction is correct, however, the SEC clearly has ample control over the Board. The petition thus is not about the Constitution's meaning but about antecedent questions of statutory interpretation. There simply is no reason for this Court to review those narrow statutory issues. And review is particularly inappropriate here because of a threshold jurisdictional issue that petitioners ignore.

STATEMENT

I. STATUTORY BACKGROUND

Since 1934, the SEC has regulated the financial disclosures of public companies. For many years, it relied primarily on the accounting profession to establish auditing standards. See S. Comm. Print No. 107-75, at 17 (2002). Despite recurring scandals, reform efforts proved largely ineffective. See *id.* at 17-18. In 2001-2002, further audit failures cost investors nearly half a trillion dollars. See Warmus, *Qualitative Disclosure Under Amended Form 8-K*, 89 Marq. L. Rev. 881, 881 (2006).

In response, Congress conducted two dozen hearings and considered more than 20 bills. See 1 *Corporate Fraud Responsibility*, at xi-xxi (Manz ed., 2003). It then

passed Sarbanes-Oxley by a vote of 423 to 3 in the House and 99 to 0 in the Senate. Pub. L. No. 107-204, 116 Stat. 745 (2002); 148 Cong. Rec. H5480, S7365 (daily ed. July 25, 2002). Noting no concerns about intrusion on executive power, President Bush signed the Act into law. *Statement on Signing the Sarbanes-Oxley Act of 2002*, 2002 Pub. Papers 1322 (July 30, 2002).

Title I established the Board to oversee the audit of public companies. 15 U.S.C. §7211(a). In designing the Board, Congress borrowed from its experience with self-regulatory organizations ("SROs") like the National Association of Securities Dealers. S. Rep. No. 107-205, at 12 (2002). SROs have long helped oversee the securities industry, but always subject to pervasive SEC oversight: SROs "'have no authority to regulate independently of the SEC's control.'" *NASD* v. *SEC*, 431 F.3d 803, 807 (D.C. Cir. 2005) (quoting S. Rep. No. 94-75, at 23 (1975)).

Sarbanes-Oxley assigns the Board duties comparable to an SRO's: The Board must register accounting firms, set auditing standards, conduct inspections, and investigate and sanction violations. 15 U.S.C. §7211(c). The Act also sets forth a comprehensive oversight scheme that gives the SEC even more control than it has over SROs.

SEC Control Over Rules. The Board's rules, including auditing standards, have no effect unless the SEC approves them following the same notice-and-comment process that governs SRO rules. 15 U.S.C. §7217(b)(2), (4). The Board can adopt internal "housekeeping" rules without prior approval, although the SEC may abrogate those rules "summarily." *Id.* §78s(b)(3). The SEC may also abrogate, delete from, or add to existing rules "to assure the fair administration of the [Board] * * * or otherwise further the purposes of th[e] Act, the securities

laws, and the rules and regulations thereunder applicable to th[e] Board." *Id.* §7217(b)(5).

SEC Control Over Sanctions. The SEC can review any Board sanction on its own initiative or upon request under the same procedures that govern SRO sanctions. 15 U.S.C. §7217(c)(2). Findings are reviewed *de novo*, see *NASD* v. *SEC*, 431 F.3d at 804, and the SEC can "enhance, modify, cancel, reduce, or require the remission of" any sanction it deems "not necessary or appropriate in furtherance of th[e] Act or the securities laws" or "excessive, oppressive, inadequate, or otherwise not appropriate," 15 U.S.C. §7217(c)(3). Sanctions are automatically stayed pending SEC review unless the SEC orders otherwise. *Id.* §7215(e)(1).

SEC Control Over Inspections and Investigations. Board inspections and investigations must be conducted according to SEC-approved rules. 15 U.S.C. §§7214(c), 7215(a). Investigations involving potential securities-law violations must be coordinated with the SEC. *Id.* §7215(b)(4)(A). Inspection reports (which lack legally operative effect) are subject to SEC review. *Id.* §7214(h).

SEC Control Over Registration. Registration of accounting firms is governed by SEC-approved rules. 15 U.S.C. §7212(b)(1). Denial of registration is subject to SEC review. *Id.* §7212(c)(2).

SEC Control Over Board Members. The SEC appoints the Board's five members for five-year terms, 15 U.S.C. §7211(e)(4)-(5), and can remove them "for good cause," *id.* §7211(e)(6). Cause exists where a Board member has "willfully violated any provision of th[e] Act, the rules of the Board, or the securities laws"; has "willfully abused [his] authority"; or, "without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard."

Id. §7217(d)(3). The SEC can also censure Board members, censure the Board, or limit Board activities. *Id.* §7217(d)(2)-(3).

SEC Control Over Jurisdiction. The SEC has broad power to rescind the Board's authority: It can "relieve the Board of any responsibility to enforce compliance with any provision of th[e] Act, the securities laws, the rules of the Board, or professional standards" whenever doing so is "consistent with the public interest, the protection of investors, and the other purposes of th[e] Act and the securities laws." 15 U.S.C. §7217(d)(1). The SEC can also add to the Board's duties. *Id.* §7211(c)(5).

SEC Control Over Finances. The Board's budget is subject to annual SEC approval, 15 U.S.C. §7219(b), and the SEC can condition approval on specific changes, see *PCAOB Budget Approval Process*, 71 Fed. Reg. 41,998, 42,000 (July 24, 2006). The Board is funded primarily by a support fee paid by public companies. 15 U.S.C. §7219(d). That fee, and the Board's rules for allocating, assessing, and collecting it, must be approved by the SEC. *Ibid.*

SEC Control Over Internal Processes. The Board began operations only once the SEC found it was ready. 15 U.S.C. §7211(d). The SEC may impose (and has imposed) record-keeping and reporting requirements on the Board, and it can examine Board records. See *id.* §7217(a) (incorporating 15 U.S.C. §78q(a)(1), (b)(1)); 71 Fed. Reg. at 42,000. Even the Board's ability to initiate or defend a lawsuit is subject to SEC approval. 15 U.S.C. §7211(f)(1). In granting approval to defend this very suit, the SEC required that its General Counsel oversee every aspect of the case—from selection of outside counsel to the content of all filings.

The SEC's Independent Authority. Sarbanes-Oxley preserves the SEC's pre-existing authority, 15 U.S.C. §7202(c), and authorizes the SEC to promulgate rules to implement the Act, *id.* §7202(a). The Act also gives the SEC independent authority to investigate and discipline violations of Board rules. See *id.* §7202(b)(1); *id.* §78u (as amended by Sarbanes-Oxley §3(b)(2)).

Judicial Review. Sarbanes-Oxley and the Exchange Act establish a comprehensive review scheme. Parties aggrieved by Board actions may generally seek review before the SEC, see, *e.g.*, 15 U.S.C. §7217(b)(4), (c)(2), and then in the court of appeals under the same provisions that govern SRO actions, *id.* §78y(a)-(b). Judicial review must be sought within 60 days of the SEC's decision, *id.* §78y(a)(1), (b)(1), and objections not raised before the SEC are normally waived, *id.* §78y(c)(1).

II. THIS LAWSUIT

A. Proceedings in District Court

Beckstead and Watts, LLP ("Beckstead") is a Nevada accounting firm registered with the Board. Pet. App. 8a. After an inspection uncovered apparent deficiencies in several Beckstead audits, the Board initiated a formal investigation. *Ibid.*; C.A. App. 26.

Beckstead responded by filing this facial constitutional challenge in district court, together with Free Enterprise Fund. Pet. App. 8a. The complaint alleged that Sarbanes-Oxley violates separation of powers, the Appointments Clause, and the non-delegation doctrine. *Ibid.* Beckstead asserted that it was injured because the Board's auditing standards increased the time and expense of audits; the inspection report damaged its reputation; and the investigation subjected it to "burdensome discovery" and "legal fees." C.A. App. 26-27. Although

Free Enterprise Fund alleged that its members were "subject to the Board's authority" and "injured by the [Board's] regulations," *id.* at 13, the only member it has identified is its co-plaintiff, Beckstead, see *id.* at 35-36. Neither plaintiff sought relief from the SEC.

The United States intervened to defend the Act, Pet. App. 8a, and the district court granted summary judgment upholding it, *id.* at 105a-117a. The court acknowledged a "colorable" argument that petitioners' failure to invoke the Act's review procedures deprived the court of jurisdiction. *Id.* at 111a. The court agreed that Sarbanes-Oxley established an "exclusive administrative review" scheme. *Ibid.* But it rejected the jurisdictional challenge because it deemed petitioners' claims "collateral" to that scheme. *Ibid.* The court nevertheless rejected all of petitioners' claims. *Id.* at 112a-116a.

B. The Court of Appeals' Decision

The court of appeals affirmed. Pet. App. 1a-40a.

1. Addressing jurisdiction first, the court did not dispute that the Act establishes an exclusive review scheme. But, like the district court, it deemed petitioners' claims "collateral" to that scheme. Pet. App. 10a. Noting that the statutory review procedures govern challenges to Board "order[s]" or "rule[s]," the court distinguished petitioners' suit as a "'broad-scale attack' to the Act itself." *Id.* at 9a-10a (citation omitted).

2. The court then rejected petitioners' claims on the merits.

a. The Appointments Clause requires principal officers to be appointed by the President and confirmed by the Senate, but permits Congress to "vest the Appointment of * * * inferior Officers * * * in the Heads of Departments." U.S. Const. art. II, § 2. The court of appeals

rejected petitioners' argument that Board members are principal officers who may only be appointed by the President. Pet. App. 12a-20a. Under *Edmond* v. *United States*, 520 U.S. 651 (1997), "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663. Board members, the court held, are inferior officers under that standard because their work is pervasively controlled by the presidentially appointed Commissioners of the SEC. Pet. App. 12a-13a.

The SEC, the court explained, must approve all Board rules and can modify or abrogate them. Pet. App. 12a. The SEC also has "plenary" authority over Board sanctions; it can appoint and remove Board members; and it can "relieve the Board of its enforcement authority altogether." *Id.* at 12a-13a. Like the coast guard appellate judges found to be inferior officers in *Edmond*, "Board members 'have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.'" *Id.* at 13a (quoting 520 U.S. at 665). Indeed, the oversight powers here are broader than those in *Edmond*: The SEC can review Board decisions *de novo*, whereas review in *Edmond* was circumscribed. See *ibid.*

The SEC's pervasive control, the court held, extends to inspections and investigations. Pet. App. 18a-20a. The Board must conduct inspections and investigations according to SEC-approved rules that the SEC can alter at any time. See *id.* at 19a-20a. The SEC thus can "modify the Board's investigative authority as it sees fit"—such as by "mandat[ing] that all decisions regarding investigation * * * be approved by the Commission," "'affirmatively command[ing]' an investigation," or "micromanag-

ing" Board operations if necessary in the public interest. *Id.* at 19a-20a & n.6. All inspection reports, moreover, are subject to SEC review, and the SEC itself can investigate violations. *Id.* at 19a. "Because the Board's exercise of its powers under the Act is subject to comprehensive control by the Commission and Board members are accountable to and removable by the Commission," the court held, "Board members are inferior officers." *Id.* at 20a.

The court of appeals also rejected petitioners' alternative Appointments Clause arguments. Citing uniform precedent, the court held that the SEC is a "department" capable of appointing inferior officers and that the Commission (*i.e.*, the Commissioners collectively) is the SEC's "head." See Pet. App. 20a-25a.

b. The court similarly rejected petitioners' separation-of-powers challenge. Sarbanes-Oxley does not impermissibly intrude on the President's executive power, the court held, because the SEC has pervasive control over the Board and the President has constitutionally sufficient control over the SEC. See Pet. App. 26a-37a.

The court first explained that even so-called "independent agencies" like the SEC have only limited autonomy. Pet. App. 28a. The President appoints SEC Commissioners and can remove them for cause. *Ibid.* Cause includes "'inefficiency, neglect of duty, or malfeasance in office,'" criteria this Court has described as "'very broad,'" authorizing removal "'for any number of actual or perceived transgressions.'" *Id.* at 28a & n.8 (quoting *Bowsher* v. *Synar*, 478 U.S. 714, 729 (1986)). The President influences SEC policy in other ways as well. See *id.* at 28a-29a.

The SEC, in turn, has "'sweeping'" control over the Board. Pet. App. 29a. "No Board rule is promulgated

and no Board sanction is imposed without the Commission's stamp of approval." *Id.* at 30a. And the SEC can "'withdraw or preempt any aspect of the Board's substantive regulatory authority at any time,'" essentially wielding "at-will removal power over Board functions." *Id.* at 30a, 35a. Thus, "all Board functions are subject to pervasive Commission control." *Id.* at 30a-31a.

The court noted that "the President is not, as the Fund contends, 'completely stripped' of his ability to remove Board members." Pet. App. 34a. The SEC can remove Board members, and the President in turn can remove SEC Commissioners. *Ibid.* Further, "it is far from clear that the Commission would share the Fund's cramped interpretation of its removal authority." *Id.* at 36a. Most importantly, the "vast degree of Commission control" provided by the Act's other oversight mechanisms "mitigat[ed] [any] concern regarding the scope of the removal restrictions." *Id.* at 36a, 38a.

Finally, the court emphasized that, because this is a facial challenge, petitioners bore a "heavy burden to demonstrate that the Act * * * *cannot* be constitutionally applied." Pet. App. 37a & n.14. The court also noted its "duty to construe statutes to avoid constitutional infirmity." *Id.* at 37a. The court therefore refused to "interpret[] the Commission's powers of oversight narrowly * * * to create constitutional problems where there are none." *Id.* at 39a. Properly construed, the Act leaves "no instance in which the Board can make policy that the Commission cannot override." *Ibid.*

3. Judge Kavanaugh dissented in part. He disagreed with the majority's interpretation of Sarbanes-Oxley's oversight provisions. See Pet. App. 77a-80a, 91a-97a. Construing those provisions narrowly, he argued that the Act violates separation of powers and the Appointments

Clause. *Id.* at 55a-97a. He agreed with the majority, however, that the SEC is a "department" and that the Commission is its "head." *Id.* at 97a n.24.

REASONS FOR DENYING THE PETITION

Disclaiming any circuit conflict (Pet. 13), petitioners urge that Sarbanes-Oxley's alleged intrusion into executive power justifies review. But the Executive Branch—through two different administrations—has consistently denied that its powers have been invaded. And petitioners' assertions reflect a dispute not about constitutional principle but about the proper construction of Sarbanes-Oxley. Petitioners repeatedly invite the Court to adopt unreasonable constructions of the Act to manufacture constitutional defects where none exist, substituting hyperbole about the Board's "independen[ce]" and "unchecked power"—drawn from the *dissent* below and the Act's legislative *opponents*, see Pet. 2, 9, 12, 16[1]—for analysis of the actual statutory text.

When the Act is properly construed, this case is not petitioners' "mountain" but at best a "molehill." Pet. App. 32a n.11. The Act equips the SEC with "extraordinary" control, "essentially granting at-will removal power over Board functions if not Board members." *Id.* at 7a, 35a. The President, in turn, can remove SEC Commissioners for neglect in exercising their oversight powers. He thus has no less control here than in any other area under the SEC's jurisdiction. That SEC and presidential control forecloses petitioners' claims. In any event, petitioners' deliberate bypass of the Act's exclusive review

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[1] Former Senator Gramm, the source of petitioners' "'massive power, unchecked power, by design'" comment, Pet. 2, 9, *opposed* the bill for much of the process. See, *e.g.*, S. Rep. No. 107-205, at 2, 66-67.

procedures raises serious jurisdictional questions and militates strongly against review in this case.

I. This Case Is A Poor Vehicle Because There Are Substantial Questions About This Court's Jurisdiction

Petitioners omit any mention of the jurisdictional issue—addressed by both courts below, Pet. App. 9a-11a, 110a-111a—that stands between this Court and the questions presented. When Congress channels review through a specified mechanism, courts lack jurisdiction to entertain challenges by other means. See *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 218 (1994); *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 419 (1965). A statute that comprehensively specifies where, when, and how challenges may be brought evidences Congress's intent that the review scheme be exclusive. See *Thunder Basin*, 510 U.S. at 216; *Whitney Nat'l Bank*, 379 U.S. at 420-422.

Sarbanes-Oxley is precisely such a statute. For every Board action, the Act specifies where, when, and how review may be sought, generally requiring parties to seek review before the SEC, see 15 U.S.C. §7217(b)(4) (rules); *id.* §7217(c)(2) (sanctions); *id.* §7212(c)(2) (denial of registration), and then in the court of appeals, *id.* §78y(a)-(b). Congress's intent is particularly clear here: The Act incorporates SRO review provisions long construed to be exclusive. See 15 U.S.C. §7217(b)(4)-(5), (c)(2); *Swirsky* v. *NASD*, 124 F.3d 59, 62 (1st Cir. 1997) (citing cases).

Neither petitioners nor the courts below disputed that Sarbanes-Oxley establishes an exclusive review scheme. The court of appeals nonetheless held that petitioners' claims were "collateral" to that scheme because the statutory procedures "are confined to challenges to an 'order' or a 'rule' of the Board," whereas petitioners' "fa-

cial challenge * * * advances a 'broad-scale attack' to the Act itself." Pet. App. 9a-10a (citation omitted).

This Court, however, rejected the same argument in *Thunder Basin*. There, as here, the review scheme addressed only challenges to specific agency actions—in that case, "order[s]" or "citation[s]." 510 U.S. at 207; 30 U.S.C. §815(a), (d). There, as here, the plaintiff asserted a broad constitutional challenge to provisions of the agency's enabling statute. See 510 U.S. at 213-215; Pet. Br. in No. 92-896, 1993 WL 337849, at 29-36 (May 10, 1993). This Court held that the claim had to be raised through the review scheme nonetheless because it could be "meaningfully addressed in the Court of Appeals" following the agency's decision, as the review scheme required. 510 U.S. at 215; see also *Nat'l Taxpayers Union* v. *SSA*, 376 F.3d 239, 243-244 (4th Cir. 2004) (applying *Thunder Basin* to facial challenge to provision of enabling statute).

Thunder Basin's holding makes sense. Parties have no standing to challenge enabling statutes in the abstract; they have standing only if the defendant takes (or threatens) action that injures them. Petitioners are not injured merely because the Board *exists*. Their claimed injuries derive from the Board's actions—its imposition of auditing standards, its inspection report about Beckstead, and its investigation of Beckstead. See pp. 6-7, *supra*. Consistent with that, petitioners sought a judgment invalidating the Board's prior actions and "enjoining the Board and its Members from taking any further action" against Beckstead. C.A. App. 31. Although their suit asserts that the statute authorizing the Board to take those actions is unconstitutional, it necessarily challenges, and seeks relief from, those Board actions.

And for every action petitioners challenge, the Act specifies a time and place for review. Petitioners could

have opposed any Board auditing standard—or any rule governing inspections, investigations, or support fees—before the SEC and then raised their constitutional claims in the court of appeals. See 15 U.S.C. §§ 7217(b)(4), 78y(a); cf. *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 463 (2001). They could have sought SEC review of any Board sanction and then raised their constitutional claims in the court of appeals. See 15 U.S.C. §§ 7217(c)(2), 78y(a); cf. *Am. Power & Light Co.* v. *SEC*, 329 U.S. 90, 96, 104-106 (1946). Or they could have sought SEC review of the Board's inspection report or petitioned the SEC to modify or revoke the Board's authority. See *id.* §§ 7214(h), 7217(b)(5), (d)(1). Petitioners cannot bypass the statutory review scheme merely by purporting not to challenge the concrete Board actions that underpin their claim of standing.

The court of appeals invoked *Time Warner Entertainment Co.* v. *FCC*, 93 F.3d 957 (D.C. Cir. 1996), for its contrary conclusion. Pet. App. 10a. Even if *Time Warner* were consistent with *Thunder Basin*, the case is inapposite. The suit there was "entirely independent of any agency proceedings, whether actual or prospective." 93 F.3d at 965; see also *Nat'l Taxpayers Union*, 376 F.3d at 244 n.3. Here, by contrast, petitioners sued the Board during a formal Board investigation, seeking to terminate the investigation. Pet. App. 8a. That is precisely the sort of intrusion into ongoing proceedings that exclusive review schemes are designed to avoid. See *McKart* v. *United States*, 395 U.S. 185, 193-194 (1969). Moreover, by bypassing the review scheme, petitioners prevented the SEC from authoritatively construing its statutory oversight powers and explaining how those powers operate in concrete instances—matters that are not only within the agency's discretion, expertise, and experience,

but could prove important if this Court's review were ever appropriate. See *id.* at 194.

Whether this particular challenge falls within the Act's review scheme, of course, is not an issue that warrants this Court's attention. But that jurisdictional issue stands between this Court and the questions presented and renders this extra-statutory facial challenge an inappropriate vehicle for review.

II. THE APPOINTMENTS CLAUSE CHALLENGE DOES NOT WARRANT REVIEW

A. The Court Properly Applied *Edmond*

The Appointments Clause requires principal officers to be appointed by the President and confirmed by the Senate, but allows Congress to "vest the Appointment of * * * inferior Officers * * * in the Heads of Departments." U.S. Const. art. II, §2. Under *Edmond* v. *United States*, 520 U.S. 651 (1997), "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663. Petitioners do not deny that *Edmond* is controlling. They merely disagree with the court of appeals' application of it. The decision below held that Board members are inferior officers because they are comprehensively "'directed and supervised'" by the SEC. Pet. App. 12a-13a. Construing the SEC's authority narrowly, petitioners insist that Board members have "extraordinary autonomy" and are thus principal officers who must be appointed by the President. Pet. 28. But that dispute over statutory interpretation lacks broad importance. And the plain text of the statute forecloses petitioners' claims.

The text of Sarbanes-Oxley makes clear that Board members are inferior officers subject to the pervasive

direction and supervision of the SEC. As the court of appeals explained, "[t]he Commission's authority over the Board is explicit and comprehensive"—"[i]ndeed, it is extraordinary." Pet. App. 7a. The SEC appoints the Board's members and can censure them, remove them, or limit their activities. 15 U.S.C. §§7211(e)(4), (6), 7217(d)(2)-(3). Board rules have no effect unless approved by the SEC, and the SEC can abrogate, delete from, or add to those rules. *Id.* §7217(b)(2), (5). Sanctions are subject to plenary SEC review and are automatically stayed pending review. *Id.* §§7215(e)(1), 7217(c). Inspections and investigations cannot be conducted except under SEC-approved rules. *Id.* §§7214(c), 7215(a). The SEC controls the Board's budget. *Id.* §7219(b). And the SEC can rescind the Board's enforcement authority. *Id.* §7217(d)(1). The SEC can thus "'withdraw or preempt any aspect of the Board's substantive regulatory authority at any time'" and wields a "vast degree of * * * control at every significant step." Pet. App. 30a, 36a.

Board members are subject to at least as much direction and supervision as the coast guard judges held to be inferior officers in *Edmond*. Just as the Judge Advocate General "exercise[d] administrative oversight" over the judges, 520 U.S. at 664, the SEC exercises administrative oversight over the Board, see, *e.g.*, 15 U.S.C. §7217(a) (incorporating 15 U.S.C. §78q(a)(1), (b)(1)). Just as the Judge Advocate General could prescribe "'rules of procedure'" for the judges, 520 U.S. at 664, the SEC can prescribe rules to govern the Board (and modify the Board's own rules), 15 U.S.C. §§7202(a), 7217(b)(5). Just as the Judge Advocate General could remove the judges, 520 U.S. at 664, the SEC can remove Board members, 15 U.S.C. §7217(d)(3). And critically, like the judges,

"Board members 'have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.'" Pet. App. 13a (quoting 520 U.S. at 665). Rather, Board rules, sanctions, and other determinations stand *only* if the SEC allows.

In fact, Sarbanes-Oxley "subjects Board members to greater supervision than the Coast Guard judges in *Edmond*." Pet. App. 13a. In *Edmond*, review of factual findings was limited to whether there was "some competent evidence in the record." 520 U.S. at 665. Here, by contrast, the SEC reviews findings underlying Board sanctions *de novo*, see p. 4, *supra*, and can reject any sanction it deems "not appropriate," 15 U.S.C. § 7217(c)(3). The SEC can reject proposed Board rules based on its independent determination of whether a rule is "consistent with the statutes *and* the public interest." Pet. App. 15a.[2] It can modify or abrogate existing rules to "further the purposes of th[e] Act" and the securities laws. 15 U.S.C. § 7217(b)(5). And it can rescind the Board's enforcement authority whenever doing so is "consistent with the public interest, the protection of investors, and the other purposes of th[e] Act and the securities laws." *Id.* § 7217(d)(1). Board members are thus clearly inferior officers under *Edmond*.

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[2] Petitioners suggest that the SEC must approve any rule "consistent with the Act '*or*' the public interest." Pet. 37 n.4. But Congress could not possibly have meant to require the SEC to approve rules that *violate* Sarbanes-Oxley so long as they are consistent with the public interest, or vice versa. The court properly corrected an obvious scrivener's error to avoid that absurd construction. See *United States* v. *Fisk*, 70 U.S. 445, 447 (1866). Besides, even after approving a rule, the SEC can abrogate it under a highly discretionary standard. See 15 U.S.C. § 7217(b)(5).

B. Petitioners' Contrary Arguments Do Not Support Review

1. Petitioners' analysis begins, not with *Edmond* or the statutory text, but with unfounded rhetoric. Petitioners assert that Congress modeled the Board after SROs in order to "render the Board independent of the SEC." Pet. 27-28. But the SRO model confirms that Congress intended *plenary* SEC control: SROs are not only "'subject to SEC oversight'" but "'have no authority to regulate independently of the SEC's control.'" *NASD* v. *SEC*, 431 F.3d 803, 807 (D.C. Cir. 2005) (quoting S. Rep. No. 94-75, at 23 (1975)).[3]

Petitioners urge that Board members "rais[e] their own revenue" and establish broadly applicable auditing standards. Pet. 28. But the SEC controls both functions: Board support fees and auditing standards are *ineffective* without SEC approval. 15 U.S.C. §§ 7217(b)(2), 7219(d). That SEC control is what makes Board members inferior officers: *All* officers exercise "significant authority"; the line that separates principal from inferior is "direct[ion] and supervis[ion]." *Edmond*, 520 U.S. at 662-663. Finally, while petitioners complain about Board members' salaries (Pet. 16, 28), the SEC regulates those too. See *Order Approving PCAOB Budget*, 72 Fed. Reg. 73,051, 73,052 (Dec. 26, 2007).

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[3] Petitioners repeatedly invoke (Pet. 2, 8, 11, 22, 28) the court of appeals' remark that "the level of *Presidential control* over the Board reflects Congress's intention to insulate the Board from partisan forces" to some degree. Pet. App. 34a (emphasis added). But that comment explains only why the Board was *placed under the control of the SEC*, an independent agency; it nowhere suggests Congress meant to *insulate* the Board from the SEC. The SRO model was a reasonable way to create an entity focused exclusively on one problem—audit oversight—subject to comprehensive SEC control.

2. Petitioners claim the SEC's oversight is inadequate because it extends to the Board's "substantive work" but not to "Board members personally." Pet. 31-33. *Edmond*, however, draws no such distinction: "'[I]nferior officers' are officers *whose work* is directed and supervised at some level" by principal officers. 520 U.S. at 663 (emphasis added). That makes sense: Officers execute the law through their "substantive work."

Besides, the SEC *does* supervise Board members personally. The SEC can remove Board members. 15 U.S.C. §7217(d)(3). It can censure them. *Ibid.* It can modify their salaries. *Id.* §7219(b). It can exercise administrative oversight over their day-to-day work. *Id.* §7217(a). And, if necessary, it can "tighten its reins" and "micromanag[e]" them. Pet. App. 20a & n.6. The SEC's control thus plainly "extend[s] to [Board members] personally," not just their "judgments." *Edmond*, 520 U.S. at 667 (Souter, J., concurring in judgment).

Petitioners' assertion that Sarbanes-Oxley limits removal to abuses "akin to impeachable offenses" (Pet. 20-21) lacks merit. The SEC can remove Board members for *any* failure to enforce the Act "without reasonable justification or excuse," 15 U.S.C. §7217(d)(3)(C)—a capacious standard that, contrary to petitioners' claim, could often authorize removal for "inefficiency or policy mistakes." Pet. 32. The SEC's authority to remove Board members for "willful[]" violations or abuses of authority, 15 U.S.C. §7217(d)(3)(A)-(B), is similarly expansive: "Willfulness" in the securities context requires only volitional conduct, not knowing violation of the law. See *Wonsover* v. *SEC*, 205 F.3d 408, 413-415 (D.C. Cir. 2000). The court of appeals properly concluded that the SEC could construe its removal authority broadly. Pet. App. 18a, 36a-37a. And petitioners' disagreement with the

court's construction of this particular removal provision hardly warrants review.[4]

In *Edmond*, of course, the Judge Advocate General could remove judges "without cause," but that removal power was not truly "at will" because he could not "attempt to influence (by threat of removal or otherwise) the outcome of individual proceedings." 520 U.S. at 664. Besides, for-cause removal provisions do not *ipso facto* convert inferior officers into principal officers. Removal authority (and its scope) is *one factor*, but it is not dispositive. See *id.* at 664-665. This Court has repeatedly found for-cause provisions consistent with inferior-officer status. See *United States* v. *Perkins*, 116 U.S. 483, 485 (1886); *Morrison* v. *Olson*, 487 U.S. 654, 663, 671 (1988). So has the Executive Branch. See *Applicability of Executive Order No. 12674 to Personnel of Regional Fishery Management Councils*, 17 Op. Off. Legal Counsel 150, 156 & n.19 (1993). Even the dissent below conceded that inferior officers could be removable only for cause. Pet. App. 89a. The dissent claimed such limitations are permissible only if the officer's superior has "statutory authority to prevent and affirmatively command, and to manage the ongoing conduct of, all significant exercises of [his] executive authority." *Ibid.* Even if that were the test, the majority construed the Act to grant the SEC precisely that authority here. See *id.* at 18a-20a & n.6. Given that "vast degree of Commission control," *id.* at 36a, Board members are inferior officers.

3. Finally, petitioners insist that the SEC lacks control over inspections and investigations. Pet. 33. But they again ignore the statutory text. For example, Sec-

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[4] If the limitations on removal were too restrictive, moreover, they could be severed. See *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984).

tion 7217(d)(1)—a provision petitioners nowhere mention—authorizes the SEC to "relieve the Board of *any responsibility* to enforce" the Act based on a mere public-interest finding. 15 U.S.C. § 7217(d)(1) (emphasis added). And because the SEC has independent enforcement authority, see p. 6, *supra*, it could effectively reassign any Board investigation to its own staff.[5] Petitioners complain that the SEC's power to "*supplant*" Board functions does not enable it to "supervise" them. Pet. 25-26, 33. But the two go hand-in-hand: The mere possibility that the SEC will rescind the Board's authority can ensure the Board acts in a manner the SEC approves. As with removal authority, the existence of the rescission power, not just its exercise, gives it bite. See *Bowsher* v. *Synar*, 478 U.S. 714, 727 n.5 (1986).[6]

The SEC, moreover, has additional means of control. All Board inspections and investigations must be conducted according to SEC-approved rules. 15 U.S.C. §§ 7214(c), 7215(a). The SEC can modify those rules at any time, or issue its own. *Id.* §§ 7202(a), 7217(b)(5). Construing that authority, the court of appeals held that the SEC could "modify the Board's investigative authority as it sees fit," including by "mandat[ing] that all decisions regarding investigation * * * be approved by the Commission" or by allowing it to "'affirmatively command' an investigation." Pet. App. 19a. "If the public interest demands increased micromanaging of Board op-

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[5] Contrary to petitioners' contention (Pet. 35-36), the Act unambiguously empowers the SEC to conduct "such investigations as it deems necessary to determine whether any person has violated * * * the rules of the Public Company Accounting Oversight Board." 15 U.S.C. § 78u(a)(1) (as amended by Sarbanes-Oxley § 3(b)(2)(A)).

[6] Although the SEC must exercise its rescission power "by rule," 15 U.S.C. § 7217(d)(1), it can forgo notice-and-comment where necessary to the "public interest," 5 U.S.C. § 553(b)(B).

erations, the Act empowers the Commission to respond accordingly." *Id.* at 20a n.6.

Petitioners' solitary response (Pet. 36-37) misreads the statute.[7] And their cramped reading of the SEC's authority ignores the requirement that courts construe statutes to avoid, not create, constitutional problems. See *Morrison*, 487 U.S. at 682. It also ignores the requirement that courts reject facial challenges like this one where the entity charged with interpreting the statute—here the SEC—has had "no occasion * * * to accord the law a limiting construction." *Wash. State Grange* v. *Wash. State Republican Party*, 128 S. Ct. 1184, 1190-1191 (2008).

Most importantly, petitioners' argument demonstrates that their complaint is not about constitutional principle but about statutory construction. Petitioners reject the court's construction of the SEC's authority but do not deny that, if that construction is correct, the SEC has ample control over inspections and investigations. There is no reason for this Court to resolve that narrow dispute over statutory construction, particularly in this jurisdictionally questionable facial challenge.[8]

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[7] Petitioners assert that 15 U.S.C. § 7217(d)(2) provides the only way the SEC may impose "limitations" on the Board. Pet. 36-37. But that provision merely authorizes limitations *as a sanction for Board misconduct*; it does not restrict the SEC's broad authority to regulate Board functions under other provisions. Cf. *Shurtleff* v. *United States*, 189 U.S. 311, 317-318 (1903). Congress required the Board to conduct inspections and investigations pursuant to SEC-approved rules that the SEC can modify at any time. 15 U.S.C. §§ 7214(c), 7215(a), 7217(b)(5). Congress obviously contemplated that those rules would impose "limitations" on how the Board performs those functions.

[8] Petitioners fault the court of appeals' observation that any Board independence is "dwarfed" by the Independent Counsel's autonomy

C. Petitioners' Other Appointments Clause Arguments Lack Merit

Petitioners briefly assert that the SEC is not a "department" capable of appointing inferior officers and that the Chairman rather than the Commission is its "head." Pet. 38-39. The majority explained why both arguments lack merit. Pet. App. 20a-25a. The dissent agreed, declaring the arguments "inconsistent with current Supreme Court precedents." *Id.* at 97a n.24.

Every authority to have addressed whether significant independent agencies like the SEC are "departments" has concluded that they are.[9] Every authority has likewise concluded that the multimember commissions in charge of those agencies are their "heads."[10] And the dis-

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in *Morrison*, stressing the Independent Counsel's limited tenure and jurisdiction. Pet. 34-35. Whatever an officer's tenure and jurisdiction, he is still only an inferior if he has a superior with plenary control. See *Edmond*, 520 U.S. at 663. The court of appeals' discussion of *Morrison*, moreover, did not affect its conclusion. The court correctly held that Board members are subject to greater direction and supervision than the inferior officers in *Edmond*. Pet. App. 12a-13a. That determination compels the conclusion that Board members are inferior officers, *Morrison* aside. Finally, petitioners' contention that Board members must be principal officers to appoint staff such as the Chief Auditor (Pet. 35) is incorrect. Board staff are mere employees who may be hired by inferior officers. See *Freytag* v. *Commissioner*, 501 U.S. 868, 880-882 (1991).

[9] See, *e.g.*, *Freytag*, 501 U.S. at 918-921 (Scalia, J., concurring in judgment, joined by O'Connor, Kennedy, and Souter, JJ.); *Silver* v. *U.S. Postal Serv.*, 951 F.2d 1033, 1038 (9th Cir. 1991); *Authority of Civil Service Commission To Appoint a Chief Examiner*, 37 Op. Att'y Gen. 227, 231 (1933). Petitioners rely on *Freytag* (Pet. 38), but *Freytag* expressly distinguished "appointment of an inferior officer by the head of one of the principal agencies, such as * * * the Securities and Exchange Commission." 501 U.S. at 887 n.4.

[10] See, *e.g.*, *Silver*, 951 F.2d at 1038-1039; *id.* at 1044 n.3 (O'Scannlain, J., dissenting); 37 Op. Att'y Gen. at 231. That the Chairman has ad-

trict court held that petitioners lacked standing to pursue this claim, Pet. App. 114a, another jurisdictional defect that petitioners ignore.

III. The Separation-of-Powers Challenge Does Not Warrant Review

A. The SEC's Pervasive Control Forecloses Any Separation-of-Powers Claim

The Constitution vests the President with the "executive Power" and charges him to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§1, 3. Sarbanes-Oxley does not intrude on that authority. There simply is no "law" the Board can "execute"—or refuse to execute—free from the SEC's pervasive oversight and control. And the SEC is accountable to the President, who can remove Commissioners for neglect of their duty to supervise the Board. The President's authority here is no different from his authority over any other area under the SEC's jurisdiction.

Petitioners do not appear to claim that the Constitution requires that the President be able to control Board members *directly*. Any such claim would be foreclosed by centuries of precedent. It has long been the rule, for example, that inferior officers appointed by department heads "hold their office at the discretion of the appointing power"; consequently, the President has "no power" to remove them. *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 260 (1839); *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal

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ditional administrative responsibilities (Pet. 38-39) does not make him the SEC's "head"; the Commission as a whole "retain[s] all substantive responsibilities" and "policy control." *Special Message to the Congress*, 1950 Pub. Papers 199, 202 (Mar. 13, 1950). Moreover, contrary to petitioners' claim (Pet. 39), the Chairman alone does not appoint inferior officers. See Pet. App. 25a; PCAOB C.A. Br. 37-38.

Counsel 124, 166 (1996).[11] In *Morrison*, the President could not remove the Independent Counsel directly; he could only instruct the Attorney General to do so. See 487 U.S. at 663. The President exercises his other oversight powers the same way: not by supervising inferior officers directly but by supervising the principal officers to whom the inferior officers report. See *The President and Accounting Offices*, 1 Op. Att'y Gen. 624, 626 (1823).

Petitioners thus apparently contend that Sarbanes-Oxley "completely strip[s]" the President of his *indirect* oversight power—his ability to ensure faithful execution of the laws through his oversight of the principal officers to whom inferior officers report. Pet. i. But the Act plainly does no such thing. The Act gives the SEC vast control over the Board—both pervasive control over all Board functions, see pp. 15-17, *supra*, and broad for-cause removal power, see p. 19, *supra*. And the SEC is just as accountable to the President here as in any other context. The President can remove Commissioners for "'inefficiency, neglect of duty or malfeasance in office,'" *MFS Sec. Corp.* v. *SEC*, 380 F.3d 611, 619 (2d Cir. 2004)—"very broad" terms that "could sustain removal * * * for any number of actual or perceived transgressions," *Bowsher*, 478 U.S. at 729.

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[11] *Hennen*'s holding that the power to remove follows the power to appoint is as old as the Republic itself. In the "Decision of 1789," one of Congress's principal grounds for concluding that the President alone can remove *principal* officers was that he appoints them. See *Myers* v. *United States*, 272 U.S. 52, 119 (1926); 1 Annals of Cong. 383-399, 473-614 (Gales ed., 1834). The corollary is that, where a *department head* appoints, only the *department head* can remove. Thus, the Postmaster General had "sole and exclusive authority" to remove officers he appointed. 3 J. Story, *Commentaries on the Constitution of the United States* § 1530, at 387 (1833).

Such "transgressions" could plainly include neglect of duty in supervising the Board. "A public officer in charge of an office is removable for such inefficiency, neglect of duty, or wrongdoing of subordinates over whom he or she has supervisory control as reasonably indicates inefficiency, neglect of duty, or wrongdoing of the supervising officer herself or himself." 63C Am. Jur. 2d *Public Officers and Employees* § 179, at 610 (1997); see also *Inefficiency or Misconduct of Deputy or Subordinate as Ground for Removal of Public Officer*, 143 A.L.R. 517 (1943) (collecting cases). Tenured federal superiors have repeatedly been removed or demoted for inadequately supervising subordinates. See, *e.g.*, *Holder* v. *Dep't of Army*, 670 F.2d 1007, 1009 (Ct. Cl. 1982); *Della Valle* v. *United States*, 231 Ct. Cl. 818, 820, 822-823 (1982). And a superior's neglect to remove an inferior could be grounds for the superior's own removal, just like any other neglect to supervise: "[T]he power to suspend or discharge * * * subordinates * * * carries with it the correlative duty to vigilantly exercise the power * * * ." *Fernelius* v. *Pierce*, 138 P.2d 12, 14 (Cal. 1943); see also *McKinnon* v. *City of Berwyn*, 750 F.2d 1383, 1391 (7th Cir. 1984); *Fiacco* v. *City of Rensselaer*, 783 F.2d 319, 328-332 (2d Cir. 1986).[12]

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[12] Petitioners complain that the President might have to remove multiple Commissioners and obtain Senate confirmation for successors. Pet. 21. But that objection does not distinguish the SEC's supervision of the Board from any other SEC function. Besides, the mere threat to remove a Commissioner is a potent tool of control. See *Bowsher*, 478 U.S. at 727 n.5. That Sarbanes-Oxley states only that the SEC "may" remove Board members for cause, 15 U.S.C. § 7217(d)(3), does not mean a failure to remove cannot be a neglect of duty. Even discretionary authority can be abused. A trial judge, for example, can be reversed for failing to exclude unduly prejudicial

Petitioners' assertion that the Act "eliminate[s] the President's control of executive officers to the maximum possible extent" (Pet. 16) is thus groundless. It is not true, for example, that "the President has no power to review the Board's budget." *Ibid.* The SEC reviews the Board's budget, 15 U.S.C. §7219(b), and the SEC is no less accountable to the President on that issue than on any other. The SEC's control over the Board is plenary, and the President has the same control over the SEC's supervision of the Board as he has over any other SEC function. The President thus has no less ability to ensure faithful execution of the laws than he would have if Congress had lodged the Board's functions in the SEC's own staff (an arrangement petitioners do not contest, cf. Pet. 8, 18). So long as one accepts the SEC's own constitutionality—something petitioners do not explicitly dispute—the Board cannot violate separation of powers.

B. The Court of Appeals Properly Considered the SEC's Comprehensive Oversight

Perhaps recognizing that the SEC has comprehensive control, petitioners urge the Court to focus exclusively on removal authority. Pet. 15-16, 19-20. As an initial matter, even considering removal in isolation, the President's power plainly has not been "completely stripp[ed]." Pet. i. The Act grants the SEC broad for-cause removal power. See p. 19, *supra*. And a Commissioner's refusal to remove a Board member could justify his own removal. See p. 26, *supra*. Petitioners' assertion that "it is clear—and undisputed by both the panel majority and Respondents—that the President has no power to direct the SEC to exercise its discretion to remove a Board

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evidence even though the relevant rule states only that he "may" exclude it. Fed. R. Evid. 403.

member" (Pet. 20) is thus both disputed *and* erroneous.[13] This case therefore does not present the removal question on which petitioners actually seek review—whether Sarbanes-Oxley violates separation of powers by "completely stripping" the President of removal authority. Pet. i.

More fundamentally, petitioners' theory—that courts must ignore the SEC's comprehensive control when evaluating its removal authority—is unsupportable. "The analysis contained in [this Court's] removal cases is designed * * * to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." *Morrison*, 487 U.S. at 689-690. Removal is "*a* powerful tool" in discharging that duty. *Edmond*, 520 U.S. at 664 (emphasis added). But it is not the *only* tool.

The power to abolish an officer's *authority*, for example, is routinely treated as functionally equivalent to removal power. In *Morrison*, Justice Scalia contrasted the Independent Counsel with the Watergate Special Prosecutor, observing that "the Attorney General could have removed [the Special Prosecutor] at any time, *if by no other means than amending or revoking the regulation defining his authority*." 487 U.S. at 721 (Scalia, J., dissenting) (emphasis added); see also *United States* v. *Lib-*

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[13] See, *e.g.*, PCAOB C.A. Br. 45. The page petitioners cite states only that the President has the *same* control over the SEC's removal decisions as he does over "countless other discretionary [SEC] decisions"—not that he has *no* control. See *id.* at 46. Petitioners' reliance on manufactured "concessions" is a recurring theme throughout their petition. See Pet. 10, 24 (erroneously asserting the SEC is "concededly" independent of presidential control); *id.* at 33 (erroneously asserting there is "concededly" no provision authorizing control of inspections and investigations).

by, 429 F. Supp. 2d 27, 44 (D.D.C. 2006) (special counsel "essentially removable at will" because "the Deputy Attorney General * * * has complete discretion to take [his] authority away"); cf. *In re Sealed Case*, 829 F.2d 50, 56-57 & n.34 (D.C. Cir. 1987); 20 Op. Off. Legal Counsel at 171. There is no constitutionally significant difference between the power to remove someone from office and the power to abolish the authority of his office. That latter power is precisely what the SEC has here—the power to overturn every Board sanction, abrogate every Board rule, and relieve the Board of *any* enforcement authority whenever the public interest so warrants. See pp. 15-17, *supra*.

Quoting *Bowsher*, petitioners assert that, "'[o]nce an officer is appointed, it is only the authority that can remove him . . . that he must fear and, in the performance of his functions, obey.'" Pet. 15 (quoting 478 U.S. at 726). But petitioners' ellipsis omits the phrase "and not the authority that appointed him." 478 U.S. at 726. *Bowsher* was merely observing that the removal power, unlike the appointment power, is an effective tool for ongoing control; not that there are *no* effective alternatives. Petitioners also rely on *Morrison*. Pet. 18-19. But that case noted only that a statute can violate separation of powers for two reasons—because its removal restrictions *plus other limitations* on oversight impermissibly interfere with the President's functions; or because the removal restrictions, even apart from the other *limitations*, have that effect. See 487 U.S. at 685. *Morrison* did not suggest that, in analyzing a removal restriction, courts must ignore affirmative statutory mechanisms of oversight and control.

Sarbanes-Oxley grants the SEC such pervasive means of control, and empowers the SEC to exercise that con-

trol under such broad and discretionary standards, as to eliminate any conceivable concerns over its removal provision. See pp. 15-17, *supra*. As the court of appeals observed, the Act "essentially grant[s] [the SEC] at-will removal power over Board functions if not Board members." Pet. App. 35a. For that reason, this case does not involve "double for-cause removal provisions" in any meaningful sense. *Id.* at 66a (dissent). Whatever the scope of the SEC's power to remove Board members, the SEC's power to remove the Board's *authority* is restricted only by the SEC's own judgment of the public interest. And because the SEC's control is plenary, there is no meaningful difference between the President's control over Board members and the President's control over the SEC's own staff—or the subordinates of any other independent agency.[14]

C. Petitioners Misread the Decision Below

Petitioners finally caricature the decision below as "explicitly hold[ing] that the Constitution allows Congress to impose *any* restriction on the President's ability to appoint *or* remove inferior officers." Pet. 23-24. That

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[14] Petitioners invoke other factors from *Morrison* (Pet. 21-22), but to no avail. That the President does not appoint Board members cannot violate separation of powers; the Constitution expressly permits department heads to appoint inferior officers. U.S. Const. art. II, § 2. Moreover, that factor hardly favors petitioners: Board members are appointed by the presidentially removable SEC Commissioners while the Independent Counsel in *Morrison* was appointed by a *three-judge court*. 487 U.S. at 661 & n.3. The Board's tenure and jurisdiction are likewise immaterial. Those factors mattered in *Morrison* only because of the Independent Counsel's extraordinary autonomy. See pp. 22-23 n.8, *supra*. Lastly, Congress did have an overriding need to structure the Board the way it did. See pp. 2, 18 n.3, *supra*. The strength of that need is irrelevant, however, because the Act raises no separation-of-powers concerns.

was not the court's holding. The court held that the Act preserves the President's ability to ensure faithful execution of the laws because the SEC has pervasive control over the Board and the President has sufficient control over the SEC. See Pet. App. 26a-37a.

Petitioners' contrary claim rests on a *single sentence* of the court's 11-page separation-of-powers analysis. That sentence quoted *this Court's* holding in *United States* v. *Perkins*, 116 U.S. 483 (1886)—that, where Congress vests appointment in a department head, it may "'limit and restrict the power of removal as it deems best for the public interest.'" Pet. App. 36a (quoting 116 U.S. at 485). But the court of appeals quoted *Perkins* only to refute petitioners' suggestion that a generic "good cause" standard is "the greatest restriction Congress may impose on removal of inferior officers." *Ibid.* The court did not apply *Perkins'* "public interest" standard, much less adopt that standard as its "explicit[] hold[ing]." Pet. 23. If it had, the preceding ten pages of its opinion—addressing the scope of the SEC's and the President's control—would be superfluous. Petitioners' assertion that the court's reasoning would authorize an independent "Criminal Prosecution Board" (Pet. 12) is equally fanciful. The court upheld the Board precisely because it is *not* "independent" from the SEC. Pet. App. 30a n.9.

Far from justifying review, *Perkins* provides an alternative ground for affirmance and thus another reason to deny the petition. Notwithstanding the general rule that the President's executive power "includ[es] the power of appointment and removal of executive officers," *Myers* v. *United States*, 272 U.S. 52, 163-164 (1926), Congress's *express* authority to vest appointment of inferior officers in department heads has been understood for well over a century to carry with it *implied* authority to regulate

removal of inferior officers so appointed. Justice Story endorsed that rule as early as 1833. See 3 J. Story, *Commentaries on the Constitution of the United States* § 1531, at 388 (1833). *Perkins* adopted it in 1886, holding that the "'constitutional authority in congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal * * * [of] the officers so appointed.'" 116 U.S. at 485. *Myers* accepted that holding, expressly assuming "the power of Congress to regulate removals as incidental to the exercise of its constitutional power to vest appointments of inferior officers in the heads of departments"; *Myers* merely refused to extend that rule to *presidentially appointed* inferior officers. 272 U.S. at 161. *Morrison* reaffirmed the rule. See 487 U.S. at 689-690 nn.27 & 29. And the Executive Branch has confirmed that it "remain[s] good law." 20 Op. Off. Legal Counsel at 166.[15]

Congress followed that longstanding rule when it established the Board and subjected it to the SEC's pervasive oversight. Consistent with the express terms of the Appointments Clause, Congress granted the SEC sole authority to appoint its new subordinates. See pp. 15-24, *supra*. Consistent with *Hennen*, Congress granted it sole removal power as well. See pp. 24-25 & n.11, *supra*. And consistent with *Perkins*, Congress prescribed the conditions under which it could exercise that power. See pp. 31-32, *supra*. Petitioners in effect urge the Court to disregard the settled rules that have governed all other department-head-appointed inferior officers for over 120

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[15] The most notable feature of Washington Legal Foundation's catalogue of removal disputes is that the vast majority involved *presidential appointees*. See WLF Br. 4-15. Those examples cast no doubt on *Perkins*' narrow holding regarding department-head-appointed inferior officers.

years because the SEC is an "independent" agency. But that is precisely the sort of attempt to "adjust[] the remainder of the Constitution to compensate for *Humphrey's Executor*" that should be rejected as a "fruitless endeavor." *Freytag* v. *Commissioner*, 501 U.S. 868, 921 (1991) (Scalia, J., concurring in judgment).

In any event, no such endeavor is possible here. The court of appeals upheld the Act, not because of *Perkins*, but because the SEC has pervasive control over the Board and the President has the same control over the SEC here as elsewhere. The Act thus does nothing to diminish presidential authority. The Executive Branch, through two different administrations, has agreed, undermining any claim that the Act "impermissibly intrudes into the executive function." *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 441, 449 (1977). Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2009

OPPOSITION BRIEF

No. 08-861

In the Supreme Court of the United States

FREE ENTERPRISE FUND AND BECKSTEAD AND WATTS, LLP, PETITIONERS

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

In the Sarbanes-Oxley Act of 2002, Congress created the Public Company Accounting Oversight Board (Board) to standardize and regulate the auditing of public companies, subject to plenary oversight by the Securities and Exchange Commission (SEC). The questions presented are:

1. Whether the district court lacked jurisdiction because petitioners failed to exhaust the exclusive statutory review procedures for parties aggrieved by the Board.

2. Whether Congress violated the Appointments Clause of the Constitution, Art. II, § 2, by vesting the power to appoint members of the Board in the SEC.

3. Whether Congress violated the separation of powers by entrusting the regulation of the accounting industry to the Board, subject to oversight and control by the SEC.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-104a) is reported at 537 F.3d 667. The order and opinion of the district court (Pet. App. 105a-117a) are unreported.

JURISDICTION

The opinion of the court of appeals was issued on August 22, 2008. A petition for rehearing was denied on November 17, 2008 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on January 5, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) but, as explained below, because the district

court lacked jurisdiction, this Court lacks jurisdiction to decide the merits of petitioners' constitutional claims.

STATEMENT

1. a. In the wake of the accounting debacles at Enron, Worldcom, and other prominent public companies, Congress created the Public Company Accounting Oversight Board (Board or PCAOB) as part of the Sarbanes-Oxley Act of 2002 (Act). See Pub. L. No. 107-204, 116 Stat. 745. The Act charges the Board with "oversee[ing] the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports." 15 U.S.C. 7211(a). Accounting firms that serve publicly traded companies must register with the Board and comply with auditing, quality control, and ethics standards issued by the Board. 15 U.S.C. 7212(a), 7213(a)(1).

To ensure compliance, the Act directs the Board to "conduct a continuing program of inspections" of registered accounting firms. 15 U.S.C. 7214(a). The Board is also authorized to investigate conduct by registered firms and their associated persons that may violate the Act, other securities laws, or its own rules or those of the Securities and Exchange Commission (SEC or Commission). 15 U.S.C. 7215(b). Based on the results of such investigations, the Board may initiate proceedings to impose disciplinary sanctions. 15 U.S.C. 7215(c).

b. Congress patterned the Board on the so-called self-regulatory organizations (SROs), such as the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE), see S. Rep. No. 205,

107th Cong., 2d Sess. 12 (2002),[1] that have regulated the securities markets under close government supervision for more than half a century. See generally *Gordon* v. *NYSE*, 422 U.S. 659, 663-667 (1975). The regulatory authority exercised by SROs under the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*, is "entirely derivative" and "ultimately belongs to the SEC," which has plenary authority to review and alter any regulatory or disciplinary decision the organizations may make. *NASD* v. *SEC*, 431 F.3d 803, 806 (D.C. Cir. 2005).

In drawing on that existing model of financial regulation, Congress specifically incorporated many of the provisions of the Exchange Act that govern the SROs. Congress also granted the Commission additional powers over the Board that the Commission does not possess with respect to the SROs.

c. The Commission enjoys comprehensive control over every aspect of the Board and its activities. Every rule and ethical standard issued by the Board, including rules governing the initiation and conduct of Board investigations, must be approved in advance by the Commission. 15 U.S.C. 7217(b). The SEC is empowered at any time to abrogate, add to, or delete from the Board's rules in any respect the Commission may deem necessary or appropriate to ensure the fair administration of the Board, to conform the Board's rules to the requirements of the Sarbanes-Oxley Act, or otherwise to further the purposes of that Act or the securities laws. 15 U.S.C. 78s(c), incorporated and modified by 15 U.S.C. 7217(b)(5).

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[1] In July 2007, those organizations merged their regulatory functions to create the Financial Industry Regulatory Authority (FINRA). See http://www.finra.org (visited Apr. 6, 2009).

The Board's powers of investigation and enforcement are likewise controlled by the Commission. The Board's rules governing the timing, initiation, scope, and conduct of investigations, like other Board rules, must be approved by the Commission in advance and may be modified by the Commission at any time. 15 U.S.C. 7215(b); 15 U.S.C. 78s(c), incorporated and modified by 15 U.S.C. 7217(b)(5). In addition, the Board is required to notify the SEC of investigations of potential violations of the securities laws, and to coordinate with the SEC to the extent there is a simultaneous SEC investigation. 15 U.S.C. 7215(b)(4). The Board lacks independent subpoena authority, and must apply to the SEC for a subpoena when it seeks to compel documents or testimony from any person. 15 U.S.C. 7215(b)(2)(D); compare 15 U.S.C. 78u(d) (SEC power of subpoena). Final inspection reports are subject to review before the SEC at the request of the investigated party. 15 U.S.C. 7214(h)(1).

Disciplinary sanctions imposed by the Board are subject to de novo review by the Commission, including an opportunity for a hearing before the Commission. 15 U.S.C. 78s(e)(1), as incorporated by 15 U.S.C. 7217(c)(2). The Commission may institute review of a disciplinary sanction on its own motion. 15 U.S.C. 78s(d)(2), as incorporated by 15 U.S.C. 7217(c)(2). An application to the SEC for review of a sanction, or the institution of review by the SEC on its own motion, operates as an automatic stay of the disciplinary sanction. 15 U.S.C. 7215(e). If the Commission affirms the Board's findings, it may affirm or modify the sanctions imposed by the Board, or remand for further consideration. See 15 U.S.C. 78s(e)(1)(A), as incorporated by 15 U.S.C. 7217(c)(2). If the SEC does not affirm the finding of wrongdoing, the sanction must be set aside. 15

U.S.C. 78s(e)(1)(B), as incorporated by 15 U.S.C. 7217(c)(2). In addition, the SEC may "enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board" if the Commission concludes that the Board's proposed sanction "is not necessary or appropriate" under the Act or the securities laws, or is "excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed." 15 U.S.C. 7217(c)(3)(A) and (B).

The Commission also has the authority to remove or publicly censure any member of the PCAOB "for good cause shown before the expiration of the term of that member." 15 U.S.C. 7211(e)(6); see 15 U.S.C. 7217(d)(3). In addition to its power to remove individual PCAOB members, the Commission is empowered to rescind, in whole or in part, any aspect of the PCAOB's enforcement authority at any time, based on the Commission's judgment of what is necessary to protect the public and advance the purposes of the securities laws. See 15 U.S.C. 7217(d)(1) ("The Commission, by rule, * * * may relieve the Board of any responsibility to enforce compliance with any provision of this Act, the securities laws, the rules of the Board, or professional standards.").

The Commission also possesses control over the Board's annual budget. 15 U.S.C. 7219(b). The Commission may inspect the Board's records at any time. 15 U.S.C. 78q(b)(1), as incorporated by 15 U.S.C. 7217(a). The Board's exercise of its "sue and be sued" authority is also subject to SEC control: the Board cannot appear

in court without the approval of the Commission. 15 U.S.C. 7211(f)(1).[2]

Finally, the Act grants the Commission affirmative authority in its own right to adopt "such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act." 15 U.S.C. 7202(a). Pursuant to those powers, "the Commission is empowered to modify the Board's investigative authority as it sees fit and may mandate that all decisions regarding investigation or enforcement actions against a firm be approved by the Commission." Pet. App. 19a.

2. Petitioners, a non-profit organization and an accounting firm, filed in federal district court this facial challenge to the Act's provisions concerning the Board. Pet. App. 106a-117a. At the time of the filing of the complaint, petitioner Beckstead & Watts was the subject of an ongoing formal investigation by the Board. C.A. App. A27 (para. 79). Petitioners contended that the Act violates the Appointments Clause, the constitutional separation of powers, and non-delegation principles, because the Act allegedly does not permit adequate Presidential control over the Board. Pet. App. 106a; *id.* at 4a. The United States intervened to defend the constitutionality of the Act. *Id.* at 8a, 106a.

The district court, after concluding that it possessed jurisdiction despite the exclusive review procedures in the Act and petitioners' failure to exhaust administrative remedies, Pet. App. 110a-111a, granted respondents' motion for summary judgment. *Id.* at 110a-117a. The

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[2] Indeed, the Commission approved the Board's defense of this case, and the General Counsel of the Commission has reviewed and approved the briefs filed by the Board, including the Board's response to the petition in this Court.

court observed that petitioners' facial challenge "present[s] nothing but a[] hypothetical scenario of an overzealous or rogue PCAOB investigator," noting that petitioners had no answer to respondents' position that, "if such a scenario became real, the SEC could change the rules to prevent improper investigations or remove PCAOB members for 'good cause.'" *Id.* at 116a-117a. In addition, with respect to petitioners' claim that the Board members should have been appointed by the SEC Chairman rather than by the entire Commission, the district court held that petitioners lacked standing. *Id.* at 114a.

3. a. The court of appeals affirmed. Pet. App. 3a-104a. The court first concluded that the district court possessed jurisdiction, despite petitioners' failure to exhaust the Act's statutory review procedures. The court reasoned that the judicial review procedures available under the Act are limited to challenges to an "order" or a "rule," *id.* at 9a, and that petitioners' facial challenge was a "collateral" one that was "not properly viewed as a circumvention of the Act's review procedures." *Id.* at 10a (internal quotation marks omitted).

The court rejected petitioners' contention that the Act violates the Appointments Clause by vesting the power to appoint Board members in the SEC, rather than in the President with the advice and consent of the Senate. Pet. App. 11a-20a. The court emphasized that Board members, like the Coast Guard judges in *Edmond* v. *United States*, 520 U.S. 651 (1997), "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." Pet. App. 13a (quoting *Edmond*, 520 U.S. at 665). "Because the Board's exercise of its powers under the Act is subject to comprehensive control by the Commission

and Board members are accountable to and removable by the Commission," the court concluded that Board members are "inferior" officers who may be appointed by the "Head[]" of a "Department[]" under the Appointments Clause. *Id.* at 20a. The court likewise found no merit in petitioners' claims that the Commission is not a "Department" for purposes of the Appointments Clause, *id.* at 21a-23a, or that the five members of the Commission are not the "Head[]" of the SEC, *id.* at 23a-25a.

Turning to petitioners' general separation-of-powers argument, Pet. App. 26a-37a, the court rejected efforts to characterize the Board as an agency independent of the Commission, *id.* at 29a-30a & n.9, resulting in an "excessive attenuation of Presidential control." *Id.* at 26a. The court reasoned that petitioners' arguments are "undercut by the vast degree of Commission control at every significant step." *Id.* at 36a. Comparing the Commission's "extraordinary" (*id.* at 7a), "pervasive" (*id.* at 30a), and "exhaustive" (*id.* at 39a) control over the PCAOB with the Attorney General's circumscribed authority over the independent counsel in *Morrison* v. *Olson*, 487 U.S. 654 (1988), see Pet. App. 31a-32a, the court concluded that the President's powers over the Board, through the Commission, "extend comfortably beyond the minimum required to 'perform his constitutionally assigned duties.'" *Id.* at 31a (quoting *Morrison*, 487 U.S. at 696).

Nor did the court find any merit in petitioners' arguments regarding the removal power. The court explained that petitioners' insistence that the President must have direct removal authority over all executive officers, including "inferior" officers such as PCAOB members, has no basis in law. Pet. App. 17a (citing, *e.g.*,

United States v. *Perkins*, 116 U.S. 483 (1886)), 36a. And in light of the Commission's pervasive control over the Board—including its power to rescind any aspect of the Board's enforcement authority at any time—the court reasoned that the "good cause" limitation on the Commission's authority to remove PCAOB members raises no concerns of constitutional dimension. *Id.* at 30a. The court concluded: "Given the constitutionality of independent agencies and the Commission's comprehensive control over the Board, the Fund cannot show that the statutory scheme so restricts the President's control over the Board as to violate separation of powers." *Id.* at 39a.[3]

b. Judge Kavanaugh dissented. Pet. App. 41a-104a. In his view, the Act violates separation-of-powers principles by "completely strip[ping] the President's ability to remove PCAOB members, either directly or through an alter ego." *Id.* at 66a. He also would have held that the Act violates the Appointments Clause. *Id.* at 80a-97a. He concluded that the Board members are "principal" officers because, in his view, the SEC lacks sufficient authority to remove them or affirmatively to manage their activities. *Id.* at 90a-97a. With respect to petitioners' argument that the SEC cannot appoint inferior officers because it is not a "Department[]" and its five Commissioners collectively are not the "Head[]" of a "Department[]," Judge Kavanaugh noted that, while he did not reach the issue, he "generally agree[d] with the majority opinion that [petitioners'] submission is inconsistent with current Supreme Court precedents." *Id.* at 97a n.24.

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[3] Petitioners did not pursue their non-delegation claim on appeal. Pet. App. 9a.

ARGUMENT

Petitioners renew their claims (Pet. i, 7-35) that the Sarbanes-Oxley Act of 2002 violates the Appointments Clause and the separation of powers. The decision below is correct, however, and, as petitioners acknowledge (Pet. 13), it does not conflict with the decision of any other court of appeals. Under *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the President's control over the SEC is constitutionally sufficient, and the Act in turn grants the SEC complete and pervasive control over every aspect of the Board's authority and operations. The court of appeals thus rightly observed that "[t]he bulk of [petitioners'] challenge to the Act was fought—and lost—over seventy years ago when the Supreme Court decided *Humphrey's Executor*." Pet. App. 39a-40a. In any event, this case would be a poor vehicle for reviewing petitioners' facial constitutional challenges, given that petitioners did not exhaust their administrative remedies. That failure deprived the district court of jurisdiction and, at the least, prevented the SEC from issuing an authoritative ruling on important statutory questions that underlie petitioners' challenge. Further review is not warranted.

I. REVIEW IS NOT WARRANTED BECAUSE THE DISTRICT COURT LACKED JURISDICTION AND, IN ANY EVENT, THIS CASE IS A POOR VEHICLE FOR REVIEW OF THE CONSTITUTIONAL QUESTIONS PETITIONERS SEEK TO PRESENT

A. As an initial matter, this Court's review is not warranted because petitioners failed to exhaust administrative remedies before the Commission. The courts below consequently lacked jurisdiction over the action.

Since the enactment of the Exchange Act in 1934, the federal securities laws have provided the exclusive mechanism for parties aggrieved by self-regulatory organizations to obtain judicial review. That procedure, set forth in Sections 19 and 25 of the Exchange Act, 15 U.S.C. 78s(b) and 78y(a)-(b), guarantees the Commission an opportunity to address the questions presented in an authoritative order or ruling, subject to direct review in the court of appeals. *Ibid.* See, *e.g.*, *NASD* v. *SEC*, 431 F.3d 803, 806-808 (D.C. Cir. 2005) (discussing administrative and judicial review of NASD disciplinary orders); *Swirsky* v. *NASD*, 124 F.3d 59, 62-64 (1st Cir. 1997); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *NASD*, 616 F.2d 1363, 1370 (5th Cir. 1980); *First Jersey Securities, Inc.* v. *Bergen*, 605 F.2d 690, 696 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980).

Modeling the Board on the SROs, Congress made the same judicial-review procedures applicable to the Board. See, *e.g.*, 15 U.S.C. 7217(b)(4) and (c). It is undisputed that petitioner Beckstead & Watts, the only identified member of the organizational petitioner Free Enterprise Fund before the Court, *could* have availed itself of that avenue of review. For example, Beckstead & Watts or another regulated firm could have sought Commission review of the claim that "burdensome" auditing standards adopted by the Board "have imposed substantial compliance costs" and caused the loss of clients, see C.A. App. A24 (paras. 62-64), A26 (paras. 72-73), and raised any constitutional objections before the Commission and on judicial review, see 15 U.S.C. 7217(b)(4) & (5); 15 U.S.C. 78s(b)(1) & (c), 78y(a) & (b). Likewise, Beckstead & Watts or another firm may seek de novo review by the Commission of any adverse action imposed by the Board, followed by judicial review in the court of

appeals. See 15 U.S.C. 7217(c)(2); 15 U.S.C. 78s(d)(2), 78y(a). Instead, petitioners brought this collateral challenge to the Board's ongoing investigation of petitioner Beckstead & Watts, seeking a court order enjoining that investigation and "nullifying and voiding any prior adverse action against [it]." C.A. App. 31 (prayer for relief).

In the courts below, petitioners justified their decision to proceed directly to district court on the ground that their lawsuit does not challenge any specific action or rule of the PCAOB. See Pet. App. 11a. But petitioners are not free to disregard the statutory review process established by Congress and, instead, assert facial challenges in district court untethered to particular claims of injury. As this Court explained in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), even if an agency cannot rule on the merits of a constitutional challenge to the statute it administers, a regulated firm cannot bypass exclusive administrative review procedures established by Congress as long as its constitutional claims can be "meaningfully addressed in the Court of Appeals" after administrative review. *Id.* at 215. Here, it is undisputed that judicial review of constitutional claims—including structural constitutional claims—*is* available on petition for review from decisions of the SEC. See, *e.g.*, *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 104-106 (1946) (addressing structural non-delegation claim on review from Commission); *Blinder, Robinson & Co.* v. *SEC*, 837 F.2d 1099, 1103-1109 (D.C. Cir.) (separation of powers, structural due process, and Fourth Amendment), cert. denied, 488 U.S. 869 (1988); *Sorrell* v. *SEC*, 679 F.2d 1323, 1325-1326 (9th Cir. 1982) (non-delegation challenge to NASD); *R.H. Johnson & Co.* v. *SEC*, 198 F.2d 690, 695 (2d Cir.) (same), cert. de-

nied, 344 U.S. 855 (1952). And, in a directly relevant context, at least one court has directed dismissal, for failure to exhaust administrative remedies under the Exchange Act, of a lawsuit asserting a non-delegation claim against the NASD. See *First Jersey Securities*, 605 F.2d at 696.

In addition, although the issue was not addressed by the courts below, the jurisdictional defects in petitioners' complaint are underscored by their implicit invitation to the lower courts to create a new cause of action on their behalf. See Gov't C.A. Br. 22-23. The PCAOB is not "an agency or establishment of the United States Government," 15 U.S.C. 7211(b), and petitioners accordingly do not invoke the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*; in any event, steps taken in an agency investigation are not final agency action reviewable under the APA, see *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980). Rather, petitioners assert that their cause of action is one implied directly under the Constitution. Pet. C.A. Reply 22. The federal courts should not entertain requests to create implied remedies against quasi-governmental agencies when Congress has expressly provided a mechanism for judicial review. See *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 67-68 (2001) (availability of remedial scheme provided by Congress obviates need to fashion new, judicially created remedy). None of this Court's previous cases involving Appointments Clause and removal-power claims featured a free-floating facial challenge of the kind petitioners press here. Instead, each arose through established statutory mechanisms or as defenses to enforcement actions. *E.g.*, *Freytag* v. *Commissioner*, 501 U.S. 868, 871-873 (1991) (appeal from adverse decision of Tax Court); *Morrison* v. *Olson*, 487 U.S. 654, 668-669 (1988)

(appeal from order denying motion to quash subpoena); *Myers* v. *United States*, 272 U.S. 52 (1926) (suit by dismissed officer for unpaid salary); *United States* v. *Germaine*, 99 U.S. 508 (1879) (appeal from criminal conviction involving defendant's status as "officer" as element of crime).

Because the district court lacked jurisdiction over petitioners' claims, this Court could not reach the merits of the questions presented in the petition, even if review of those questions were otherwise warranted. See, *e.g.*, *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). That jurisdictional bar warrants denial of the certiorari petition. At the least, the presence of this threshold question—which does not itself warrant this Court's review—makes this case a poor vehicle for reviewing petitioners' constitutional claims.

B. In any event, even assuming that the district court possessed jurisdiction, this is an unsuitable vehicle to review petitioners' claims.

Important statutory-interpretation questions with respect to the scope of the SEC's authority over the Board underlie petitioners' freestanding constitutional challenge. Petitioners base their facial constitutional challenge on their own answers to those statutory questions, premising their claims on the contention that the Act "strip[s] the President of all power to appoint, remove or otherwise supervise the members" of the Board. Pet. 1. If petitioners had presented their separation-of-powers challenges to the Commission, the federal courts would then have the benefit of the Commission's authoritative construction of the Act, which could well be material to petitioners' myriad contentions regarding the relative authority of the Commission and the Board—including, for example, the circumstances in which the

Commission may properly exercise its power to remove Board members. See Pet. App. 18a (observing that "the Commission could broadly interpret its removal authority in order to ensure that the Board conforms to its policies"); see *id.* at 28a & n.8 (noting that this Court has broadly interpreted for-cause removal powers).

By bringing their claims directly in federal district court, petitioners deprived the Commission of the opportunity to consider those arguments and, if necessary, to construe its own powers under the Act in light of the asserted constitutional defects. See *Ohio Civil Rights Comm'n* v. *Dayton Christian Sch., Inc.*, 477 U.S. 619, 629 (1986) ("[I]t would seem an unusual doctrine * * * to say that [an agency] could not construe its own statutory mandate in the light of federal constitutional principles."). Indeed, as the majority below observed, the dissent reached its conclusion by "interpret[ing] the Commission's powers of oversight narrowly, and the limitations attendant to for-cause removal broadly, divorced from their statutory context in a manner to create constitutional problems where there are none." Pet. App. 39a (internal citations omitted). That is precisely the opposite of what this Court has counseled. See, *e.g.*, *Hawaii* v. *Office of Hawaiian Affairs*, No. 07-1372 (Mar. 31, 2009), slip op. 11-12. ("[T]he canon of constitutional avoidance 'is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.'") (quoting *Clark* v. *Martinez*, 543 U.S. 371, 381-382 (2005)). Had the questions at issue here been brought before the Commission in the first instance, it could have made clear that it does not read the statute in this unnatural and constitutionally problematic way.

Moreover, the antecedent statutory questions are not independently worthy of certiorari. Indeed, although petitioners advert to statutory-interpretation claims at the end of their petition (Pet. 35-37), they do not seek independent review of those questions. See Pet. i (presenting only constitutional questions). Because resolution of those antecedent questions of statutory authority is necessary to intelligent resolution of the constitutional questions in this case—and because petitioners could prevail on their facial challenge only if the statute is incapable of being construed in a manner to make it constitutional—this Court should not consider the issues petitioners present at least until the Commission has opined on its construction of the Act.

Accordingly, this Court's review of the questions that petitioners seek to pose is premature. If, in an appropriate future case in which a regulated person invokes the Act's review procedures, the SEC interprets its statutory authority over the Board in such a way as to call the constitutionality of the Act into question, there would be time enough for this Court to review the relevant constitutional questions.

II. THE COURT OF APPEALS CORRECTLY REJECTED PETITIONERS' APPOINTMENTS CLAUSE CLAIM

Petitioners contend (*e.g.*, Pet. 27) that members of the PCAOB are principal officers under the Constitution who can only be appointed by the President with the advice and consent of the Senate. The court of appeals correctly rejected that claim, holding that Board members are "inferior" officers. That conclusion represents an unremarkable application of the principles established by this Court in *Edmond* v. *United States*, 520 U.S. 651 (1997). No further review is warranted.

A. The Appointments Clause provides that Congress may "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, Cl. 2.[4] "Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior." *Edmond*, 520 U.S. at 662. Accordingly, this Court has explained that an inferior officer is one "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663.

Under that analysis, the Board members are "inferior" officers, as they are in every respect subordinate to the SEC. As the court below observed, "[t]he Commission's authority over the Board is explicit and comprehensive. Indeed, it is extraordinary." Pet. App. 7a (internal citations omitted). Every auditing standard, ethics rule, or other rule or modification of a rule promulgated by the Board must be approved by the Commission, 15 U.S.C. 7217(b), and "[n]o rule of the Board shall become effective without prior approval of the Commission," 15 U.S.C. 7217(b)(2). If the Commission becomes dissatisfied with the operation of a Board rule in practice, it is empowered at any time to abrogate, add to, or delete from the rules of the Board as the Commission deems necessary or appropriate to insure the fair administration of the Board (in the Commission's judg-

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[4] All parties agree that the Board is a governmental entity for purposes of the Constitution, see *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995), and that Board members are "Officers of the United States," see *Buckley* v. *Valeo*, 424 U.S. 1, 139 (1976). See Pet. App. 112a; Pet. 7 n.1.

ment), to conform the Board's rules to the requirements of the Act (as interpreted by the Commission), or otherwise to advance the purposes of the Act, the securities laws, or the rules and regulations thereunder (again, as interpreted by the Commission). 15 U.S.C. 78s(c), incorporated and modified by 15 U.S.C. 7217(b)(5). The Commission also retains concurrent authority to adopt and enforce its own rules relating to accounting and audits. 15 U.S.C. 7202(c), 7218(c). Similarly, every disciplinary action taken by the Board is subject to automatic stay and de novo review by the Commission, which the Commission may institute on its own motion. See 15 U.S.C. 78s(d)(2) and (e)(1), incorporated by 15 U.S.C. 7217(c)(2); 15 U.S.C. 7215(e).

Nor is the Commission's power over the Board limited to substantive review of the Board's decisions. The Commission may remove or publicly censure Board members for good cause. 15 U.S.C. 7211(e)(6); 15 U.S.C. 7217(d)(3). It controls the Board's annual budget, 15 U.S.C. 7219(b), including the annual fee that funds its operations, 15 U.S.C. 7219(d)(1). The Commission must approve any request by the Board to issue a subpoena to any person. 15 U.S.C. 7215(b)(2)(D). Even the Board's sue-and-be-sued authority is subject to SEC control: the Board cannot appear in court to defend its rules or decisions without the express approval of the Commission. See 15 U.S.C. 7211(f)(1).

And on top of those and other supervisory powers, the Act grants the Commission the authority to rescind, in whole or in part, *any* aspect of the Board's enforcement authority at any time, based on the Commission's own judgment of what is necessary to protect the public and advance the purposes of the securities laws. 15 U.S.C. 7217(d)(1).

In light of those provisions, the court of appeals properly concluded that Board members are "directed and supervised" by other Executive officers, and consequently are "inferior officers" under *Edmond*. See 520 U.S. at 663.

B. Petitioners nevertheless contend that Board members are principal officers who "exercise extraordinary autonomy and power." Pet. 28. That contention disregards the statutory scheme. Like the Coast Guard judges in *Edmond*, Board members "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." Pet. App. 13a (quoting *Edmond*, 520 U.S. at 665). As the court of appeals observed, neither petitioners nor the dissenting judge could identify a single instance "in which the Board can make policy that the Commission cannot override," or in which the Board can take a final action or impose a sanction not subject to de novo review by the Commission—review that the Commission can initiate on its own motion. *Id.* at 39a.

Nonetheless, petitioners contend that Board members exercise independent authority equivalent to that of United States district court judges or the Director of the Central Intelligence Agency (CIA), Pet. 29, urging that "a definition of inferior officer which ensnares such autonomous and powerful officials must be wrong." Pet. 31. Such comparisons only highlight the extent to which petitioners' arguments are divorced from the actual provisions of the Act and the reasoning of the court below. No superior officer enjoys authority over the CIA Director or federal district judges that is remotely analogous to the "extraordinary" (Pet. App. 7a), "pervasive" (*id.* at 30a), and "exhaustive" (*id.* at 39a) control that the Commission exercises over the PCAOB. Final judgments of

district courts may be subject to appellate review, for example, but no court of appeals is empowered permanently to withdraw any aspect of the district court's enforcement authority at any time. Compare 15 U.S.C. 7217(d)(1) ("The Commission, by rule, * * * may relieve the Board of any responsibility to enforce compliance with any provision of this Act, the securities laws, the rules of the Board, or professional standards.").

C. Petitioners also briefly renew their claim (Pet. 38-39) that the Commission is not a "Department" under the Appointments Clause. See Pet. App. 21a-23a. Even the dissent below expressed skepticism of that claim, *id.* at 97a n.24, and for good reason. The SEC is the principal federal agency charged with execution of the securities laws. Like the Cabinet Departments, the Commission is subject only to the oversight of the President, without being subordinated to (or contained within) another component of the Executive Branch. Although this Court in *Freytag* left open the question whether principal non-Cabinet agencies such as the Commission are "Departments," see 501 U.S. at 887 n.4, Justice Scalia, in a concurring opinion joined by three other Justices, persuasively explained that the term should be understood to encompass "all agencies immediately below the President in the organizational structure of the Executive Branch," including "all independent executive establishments." *Id.* at 918-919 (Scalia, J., concurring in part and concurring in the judgment). As Justice Scalia observed, it would be "a most implausible disposition" to create a system in which all inferior officers within non-Cabinet agencies could not be appointed by their immediate superiors, but instead "must be appointed by the President, the courts of law, or the 'Secretary of Something Else.'" *Id.* at 919-920. Accord *Silver* v. *USPS*,

951 F.2d 1033, 1038 (9th Cir. 1991) (per curiam) (Postal Service is a "Department" under the Appointments Clause).[5]

III. THE COURT OF APPEALS CORRECTLY REJECTED PETITIONERS' SEPARATION-OF-POWERS CLAIM

Petitioners also contend (Pet. 14-27) that the Act violates more general separation-of-powers principles. But, as the court of appeals explained, "[g]iven the constitutionality of independent agencies and the Commission's comprehensive control over the Board, the Fund cannot show that the statutory scheme so restricts the President's control over the Board as to violate separation of powers." Pet. App. 39a. That conclusion is correct, and further review is not warranted.

A. In essence, petitioners contend that the Board is unconstitutional because the President lacks adequate control over the Board's exercise of Executive power. See, *e.g.*, Pet. 9. But under the Court's decision in *Humphrey's Executor*, 295 U.S. at 632, the President's control over the Commission's administration of the securities laws satisfies the Constitution. Because the Act in turn gives the Commission complete and pervasive control over the Board's authority and operations, the

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[5] Likewise, the court of appeals correctly rejected petitioners' claim (Pet. 38-39) that the chairman of the SEC, not the Commission as a whole, is the relevant "Head" under the Appointments Clause. See Pet. App. 23a-26a. As the dissent noted, "both text and longstanding Executive Branch interpretation confirm that the head of a department can consist of multiple persons." *Id.* at 97a n.24 (citing *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 151-153 (1996), and *Authority of Civil Service Commission to Appoint a Chief Examiner*, 37 Op. Att'y Gen. 227, 231 (1933)); see also *Silver*, 951 F.2d at 1038-1039.

President's control over the Board satisfies the requirements of the Constitution.

As the court of appeals concluded, petitioners' arguments that the Board has too much independence are "undercut by the vast degree of Commission control at every significant step." Pet. App. 36a. As discussed above, see pp. 3-6, 17-19, *supra*, every auditing standard, ethics rule, or other rule or modification of a rule promulgated by the Board must be approved by the Commission before it can take effect. Every disciplinary action taken by the Board is subject to automatic stay and de novo review by the Commission. The Commission can abrogate, add to, or delete from the Board's rules at any time, for any reason sufficient in the Commission's judgment. It can remove Board members for good cause. Cf. *Morrison*, 487 U.S. at 692 (upholding "good cause" removal provision that retains for the Executive "ample authority to assure that [the inferior officer] is competently performing his or her statutory responsibilities in a manner that comports with the provisions of [governing law]"). It controls the Board's budget. It decides when the Board may issue subpoenas. It decides when the Board may file suit in court, and what arguments the Board may make when it is sued. And the Commission is authorized to rescind, in whole or in part, any aspect of the Board's enforcement authority at any time, based on the Commission's own judgment of what is necessary to protect the public and advance the purposes of the securities laws. 15 U.S.C. 7217(d)(1). The court below appropriately described this last power

as effectively "at-will removal power over Board functions." Pet. App. 35a.[6]

Even apart from those provisions, moreover, Congress granted to the SEC general "oversight and enforcement authority over the Board," 15 U.S.C. 7217(a) (incorporating 15 U.S.C. 78q(a)(1) and (b)(1)), as well as sweeping rulemaking powers of its own under the Act. See 15 U.S.C. 7202(a) ("The Commission shall promulgate such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act."). As the court below recognized, those provisions grant the SEC authority, for example, "to modify the Board's investigative authority as it sees fit and [to] mandate that all decisions regarding investigation or enforcement actions against a firm be approved by the Commission." Pet. App. 19a. Indeed, the Commission has already exercised its authority under those provisions to impose additional transparency requirements on the Board, restrict the Board's budgetary discretion, and enhance the Commission's powers of oversight.[7]

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[6] Petitioners argue that the SEC's power to withdraw the Board's enforcement authority is irrelevant because it is "wholly unexercised" and thus "theoretical." Pet. 26-27. But it is the "*power* to remove," not its exercise, that "is a powerful tool for control." *Edmond*, 520 U.S. at 664 (emphasis added); see *Bowsher* v. *Synar*, 478 U.S. 714, 727 n.5 (1986) (noting that the removal power need not be exercised to exert control). The Board operates on a daily basis in the knowledge that if it strays from the Commission's guidance and instructions, it risks the loss of its regulatory authority. That is a potent tool for control, particularly in conjunction with the Commission's authority to remove Board members for good cause.

[7] For example, in July 2006 the Commission issued a detailed regulation establishing rules and timetables for its review of the Board's annual budget, see 17 C.F.R. 202.11, including explicit restrictions on

Against this background, the court of appeals correctly held that the statutory scheme does not, "taken as a whole, violate[] the principle of separation of powers by unduly interfering with the role of the Executive Branch." *Morrison*, 487 U.S. at 693. As the majority below concluded, "[t]he bulk of the Fund's challenge to the Act was fought—and lost—over seventy years ago when the Supreme Court decided *Humphrey's Executor*." Pet. App. 39a-40a.

B. As the court of appeals recognized, the hyperbole that pervades petitioners' arguments is thus misplaced. See Pet. App. 32a n.11 ("The 'sky is falling' approach to the Board's separation of powers implications is an exaggerated response to a relatively insignificant innovation."). Petitioners assert, for example, that the PCAOB represents a "wholly unprecedented" regulatory structure that presages a "sea change in the structure of the federal government." Pet. 7. In fact, as already explained, see pp. 2-3, 11, *supra*, Congress patterned the Board on the so-called self-regulatory organizations, such as the National Association of Securities Dealers and the New York Stock Exchange, that have long regulated the securities markets under government supervision. See generally *Gordon* v. *NYSE*, 422 U.S. 659, 663-667 (1975). Those organizations, and their critical roles in federal securities regulation, have been recognized in

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the Board's ability to depart from limits approved by the Commission or to reprogram funds for different purposes, 17 C.F.R. 202.11(e). Further, in connection with approving individual budgets, the Commission has directed additional actions for the Board, including directing the Board to produce a revised budgetary plan with additional information and prohibiting the Board from increasing the salaries of the Board members by more than a specified percentage. See 72 Fed. Reg. 73,051, 73,052 (2007).

federal law since the enactment of the Exchange Act in the 1930s, which required registration and provided for close SEC oversight. *E.g.*, 15 U.S.C. 78f.

In the Sarbanes-Oxley Act of 2002, Congress drew on that familiar model to provide regulation for the accounting industry, including the SEC's comprehensive oversight authority. See S. Rep. No. 205, *supra*, at 12. Indeed, in many instances, Congress simply incorporated by reference the provisions of the Exchange Act that govern the SROs. See, *e.g.*, 15 U.S.C. 78q(b)(1) (SEC's power to examine organization's records at any time), incorporated by 15 U.S.C. 7217(a); 15 U.S.C. 78s(c) (SEC's power to abrogate, add to, or delete from the rules of an SRO at any time), incorporated and modified by 15 U.S.C. 7217(b)(5). In addition, Congress gave the Commission new, broader powers over the Board that it does not possess with respect to the SROs, such as the ability to withdraw any aspect of the Board's enforcement authority at any time. 15 U.S.C. 7217(d)(1). Even more so than the SROs, therefore, the Board exercises power that is "entirely derivative" and "ultimately belongs to the SEC." *NASD* v. *SEC*, 431 F.3d 803, 806 (D.C. Cir. 2005).

There is thus no basis for petitioners' insistence that Congress established the PCAOB as a "wholly unprecedented" entity (Pet. 7) in order "to test the outer boundaries of its ability to reduce Presidential power" (Pet. 8).[8] Rather, Congress borrowed an existing regulatory

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[8] Petitioners selectively quote a statement by former Senator Gramm during congressional floor debates in suggesting that the Act grants the Board "massive power, unchecked power, by design." Pet. 2 (quoting 148 Cong. Rec. 12,119 (2002)). In fact, Senator Gramm specifically noted during the same floor speech that the bill provided for oversight by the Commission. See 148 Cong. Rec. at 12,120 (explaining

model in the financial industry and ramped it up to guarantee complete and pervasive SEC control over the Board's policies and activities. Congress had no reason to believe that approach was improper, given the constitutional validity of the Commission itself under *Humphrey's Executor*.

C. Petitioners also argue (*e.g.*, Pet. 20) that the Act violates the Constitution by "completely strip[ping]" the President's power of removal. But, as the court of appeals explained (Pet. App. 17a-18a), this Court has never held that the Constitution requires that the President have direct removal authority over *inferior* officers, such as the PCAOB members. See, *e.g.*, *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259-260 (1839). Indeed, were the rule otherwise, *Morrison* would have had to come out the opposite way.

Nor, as the court of appeals correctly concluded (Pet. App. 17a), does the Constitution preclude Congress from imposing at least some restrictions on the removal of inferior officers. See *Morrison*, 487 U.S. at 690 n.27; see also *id.* at 723-724 (Scalia, J., dissenting) (describing as "established" the proposition that the President's power "to remove inferior officers who exercise purely executive powers, and whose appointment Congress ha[s] removed from the usual procedure of Presidential appoint-

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that "to meet the constitutional test, the SEC has to have authority over it"). As the Senate committee report ultimately explained: "The Board is subject to SEC oversight and review to assure that the Board's policies are consistent with the administration of the federal securities laws, and to protect the rights of accounting firms and individuals subject to the Board's jurisdiction." S. Rep. No. 205, *supra*, at 12; *ibid.* ("The SEC can relieve the Board of any responsibility to enforce any provision of the bill, or censure or limit operations of the Board, or remove a Board member, for cause.").

ment with Senate consent, could be restricted, at least where the appointment had been made by an officer of the Executive Branch"). Even in *Myers*, the seminal case affirming the President's authority to remove principal officers performing "purely executive" functions, the Court distinguished restrictions placed on the removal of inferior officers. See *Myers*, 272 U.S. at 161-162; see also *United States* v. *Perkins*, 116 U.S. 483, 485 (1886) (Congress's authority to vest appointment of inferior officers in the heads of departments implies authority to impose restrictions on removal.).

Despite this authority, petitioners contend that the decision below is contrary to this Court's precedent, urging that it "holds that the Constitution allows Congress to impose *any* restriction on the President's ability to appoint *or* remove inferior officers, no matter how important their function." Pet. 23. But, as its decision makes clear, the court of appeals announced no such rule. Nor did it countenance a removal limitation that "sufficiently deprives the President of control over the [inferior officer] to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws." See *Morrison*, 487 U.S. at 693. The court merely held that the for-cause restriction at issue here is within Congress's power under *Perkins*, at least when coupled with the unfettered power to rescind, reject, direct, or alter any substantive decision made by the inferior officer at any time, and the authority to rescind the enforcement powers of the entity of which the inferior officer is a member. Pet. App. 35a-37a. That conclusion is both modest and fully consistent with this Court's precedents.

At bottom, petitioners' argument is that the double for-cause removal scheme established by the Act—the

President over the Commission, and the Commission over the Board—interposes too much insulation between the President and the execution of the laws. *E.g.*, Pet. 20-21. If the removal authority were the Commission's only means of control over the Board, that might present a harder question. But Congress simultaneously provided elaborate mechanisms to ensure the Commission's control over the Board and its activities—provisions that are difficult to explain if, as petitioners insist, Congress's purpose was "to test the outer boundaries of its ability to reduce Presidential power." Pet. 8. As the court of appeals reasoned, "for-cause removal is not the end of the constitutional inquiry": if Congress intended to make the Board wholly independent, "why has Congress granted such pervasive Commission authority over the Board if not to preserve the means of Executive control? Indeed, why would Congress deny the Commission at-will removal authority on the one hand and then provide the Commission with the authority to abolish Board powers on the other, essentially granting at-will removal power over Board functions if not Board members?" Pet. App. 35a. The court correctly concluded that "[c]ertainly the latter power blunts the constitutional impact of for-cause removal," and that "the Act as a whole provides ample Executive control over the Board." *Id.* at 35a-36a. That conclusion does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,

Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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ARGUMENT

I. Respondents' Exhaustion Argument Is Frivolous

Respondents seek to resurrect the frivolous "exhaustion" argument summarily dismissed by all judges below. They contend the exclusive means for challenging the *Board's* unconstitutional *structure* is to select at random "*any* [Board] rule" and then petition the appellate court to review the *SEC's* approval. Bd. Opp. 14.[1] Petitioners must invent this fictional "controversy" with the SEC over an unobjectionable rule solely to create a vehicle for challenging the Board in an appellate proceeding where the Board is not a necessary or, perhaps, even permissible party. *See infra* p. 3. Of course, no case anywhere has ever hinted that a standard provision for appellate review of agency rulemaking is the exclusive vehicle for challenging the agency's (much less another agency's) constitutionality, thus

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[1] Respondents' alternative suggestion that Petitioners should have challenged a "Board sanction" (*id.*) is disingenuous because the Board's investigation of Petitioner Beckstead did not result in sanctions, reflecting that appealing sanctions is not even an *available* route for those injured by the Board's fees, standards and investigations but not sanctioned. Even more disingenuous is the assertion that Petitioners could have brought their challenge by "seeking SEC review of the Board's inspection report [on Beckstead] or petitioning the SEC to modify or revoke the Board's authority" (Bd. Opp. 14), because appellate courts have no jurisdiction over SEC inspection-report rulings or refusals to initiate rulemaking. 15 U.S.C. §§ 78y, 7214(h)(1)-(2).

displacing a district-court proceeding for "injunctive relief" which, contrary to Respondents' characterization as "a new cause of action" (SG Opp. 13), has "long been recognized as the proper means for preventing entities from acting unconstitutionally." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001); *accord Carlson v. Green*, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting); *Davis v. Passman*, 442 U.S. 228, 241-45 (1979).

It is well-established that a statutory review mechanism is exclusive only for claims "of the type that Congress intended to be reviewed within this statutory structure," but not for "collateral" claims, *Thunder Basin Co. v. Reich*, 510 U.S. 200, 212 (1994), where the agency "lacks institutional competence to resolve the particular type of issue presented, *such as the constitutionality of the statute*," or "lack[s] authority to grant the type of relief requested," *McCarthy v. Madigan*, 503 U.S. 140, 147-148 (1992) (emphasis added). *See also McNary v. Haitian Refugee Ctr. Inc.*, 498 U.S. 479, 492 (1991); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Johnson v. Robison*, 415 U.S. 361, 373 (1974).

Here, (1) the SEC lacks "institutional competence" and "authority" to opine on separation of powers or invalidate the Board; (2) the SEC's views on the constitutional issues are entitled to no deference, *McCarthy*, 503 U.S. at 148; and (3) both the SEC and the appellate court in a statutory review procedure lack "authority to grant the type of relief requested," because the court can only *invalidate* the challenged

SEC *order*, 15 U.S.C § 78y(a)(3), but cannot enjoin the Board's regulatory authority. Indeed, it is doubtful that the statutory procedure is even an *available* route to challenge the Board's constitutionality, because the Board is not the proper respondent, 15 U.S.C. § 75y(a), and because jurisdiction extends only to "persons aggrieved by final orders of the Commission," *id.* § 78y(a)(1), which might not encompass those aggrieved by Board actions unrelated to the rule on appeal.

Accordingly, a challenge to the Board's structure unrelated to the statutory legitimacy of any SEC rule is plainly "collateral" to a provision designed for reviewing that statutory legitimacy, and produces no judicial economies. The Solicitor General feebly argues that the challenge here somehow "deprived the Commission of the opportunity" to provide an "authoritative construction of the Act." SG Opp. 14-15. But the Commission in the lower courts and here has provided (in the United States briefs it joined) its "construction of the Act," just as it would have in Respondents' statutory-review case, and its views on the Board's constitutional structure are obviously not "authoritative."

Accordingly, there is nothing in precedent, logic or congressional intent which supports treating Respondents' proposed alternative as an *exclusive* mechanism that displaces the "long-recognized" procedure of a district-court equitable action.

II. The Issues Warrant Review

Respondents engage in a feeble effort to convert "the most important separation-of-powers case ... in the last 20 years" (Pet. App. 41a) into a dispute over "narrow statutory issues." Bd. Opp. 2. They contend that if the panel majority's view of the SEC's statutory authority to pervasively control and assume the Board's functions is accepted, then the "constitutional issues" somehow "evaporate." *Id.* This is a blatant distortion of the issues presented.

As the Petition and briefs below make clear, even assuming the SEC has "at-will removal power over Board functions" (Pet. App. 7a, 35a)—the only cognizable statutory disagreement between the parties—this cannot possibly cure the Act's "impermissibl[e] interfere[ence] with the *President's* exercise of *his* constitutionally appointed functions." *Morrison v. Olson*, 487 U.S. 654, 685 (1988) (emphasis added). This is because (1) it is undisputed that the President cannot order the SEC to assume the Board's functions; (2) Article II protects the "President's ... power to control or supervise ... executive *official[s]*," not functions, *id.* at 692 (emphasis added), which is impossible unless the President or his alter ego has some realistic ability to remove those officials; and (3) the SEC's theoretical ability to transfer the Board's functions to itself is a constitutional irrelevance because it is unexercised.

In response, the panel majority and Respondents contend that where, as here, the President has constitutionally "sufficient control" over an

independent agency like the SEC, this necessarily "preserves the President's ability to ensure faithful execution of the laws [by the Board] because the SEC has pervasive control over the Board." Board Opp. 31.

The fundamental flaw in this reasoning is that "the *President's* ability" to execute the laws is plainly not "preserve[d]" unless his control over the SEC is such that he has "sufficient" authority over *Board members* (the officials executing the law) to "control" and "supervise" their functions. *Morrison*, 487 U.S. at 692, 696. And, with respect to *every* mechanism through which the SEC purportedly controls the Board, it is clear that the President has no ability to influence the SEC in a manner that could possibly control the Board. It is undisputed that the President has no ability to force the SEC to usurp or limit the Board's functions, dictate the SEC's review of the Board's rules or influence who is appointed to the Board. The President and the SEC do not even suggest that the President can direct how the SEC performs its discretionary authority to remove. And even the Board contends (Opp. 26) only that the President can weigh in with the SEC when the need to remove a Board member is so clear as to constitute a "duty" (which will not occur absent impeachable conduct given the extraordinarily limited grounds for removing members). And all concede that removal of Board members can be effectuated only if the Senate confirms replacement SEC Commissioners—itself an impermissible congressional interference with the President's removal authority.

Thus, since the panel majority did not even attempt to argue that the President can tell the SEC how to use its various devices to control the Board, the scope of that control is largely beside the point. Accordingly, *regardless* of the scope of SEC power over the Board's investigative functions, this case squarely presents the novel and important question whether a statute vesting an *independent* agency with power to review or supplant another agency's *work product* satisfies the Constitution's requirements for *Presidential* appointment and removal of executive *officers*.

1. Respondents do not dispute that this "case of first impression" (Pet. App. 26a) presents a novel question. They do not contend that any case addresses whether a federal agency whose officers are not appointed or removable by the President becomes constitutional because "supervised" by a Fourth Branch agency. Indeed, no case could have upheld that arrangement because, as Respondents do not dispute, the heads of *every* other enforcement agency are appointed and removed by the President and no other agency is "supervised" by an independent agency. (The Solicitor General notes (Opp. 25) that there is a *private* analogue to the Board—the New York Stock Exchange—but this is irrelevant because such private entities need not be subject to Presidential control and, indeed, reaffirms the Board's invalidity because the President obviously has no ability to supervise the Exchange.)

Similarly, Respondents, like the panel majority, do not pretend that the Board somehow *satisfies* the factors identified in *Morrison* for assessing the validity of removal restrictions or the statute "as a whole." *Morrison*, 487 U.S. at 685, 693; Pet. 21-23. Rather, to the extent they even discuss *Morrison*, Respondents argue only, again, that pervasive SEC "oversight" satisfies separation of powers, rendering the particular *Morrison* factors inapposite. Bd. Opp. 29, 30 n.14; SG Opp. 28. In short, Respondents do not contend that any precedent answers the question presented; they simply argue that the Constitution is satisfied by an independent agency's supervisory authority over the Board—a plainly novel issue.

This issue is also of threshold importance. Respondents do not dispute that if, as they and the panel majority contend, an independent agency's "pervasive" supervision of a Fifth Branch agency's work product is constitutionally acceptable, then Congress is necessarily free to have all executive functions performed by officers neither appointed nor removable by the President, so long as they are "supervised" by independent agencies. Pet. 11-13. The Solicitor General does not dispute this at all, and the Board does not dispute that a "Criminal Prosecution Board" (or similar entity performing a core executive function) is constitutional under the decision below if it is no more "independent" from an independent "Criminal Prosecution Commission" than the Board is "from the SEC." Bd. Opp. at 31. Thus, it remains undisputed that, under the holding below, Congress can require all executive functions to

be carried out by officers whom the President cannot appoint, remove or review if the statute allows a Fourth Branch agency to review or supplant those functions. Congress should not be authorized to so decapitate the Executive's traditional powers without this Court's careful consideration and guidance.

2. Respondents also cannot rebut Petitioner's showing that the decision below is contrary to precedent.

First, without attempting to defend the absurd reasoning of the court below relating to "facial challenge[s]," Pet. App. 37a n.14, Respondents argue that the SEC's "wholly unexercised" "*power* to remove" the Board's *functions* is a "powerful tool for control," because the mere threat to do so will induce the Board to follow "the Commission's guidance." SG Opp. 23 n.6; Bd. Opp. 28-29. But this *SEC* "threat" cannot enable *Presidential* control because *he* cannot order the withdrawal of Board functions. Again, this argument repeats the panel majority's fundamental mistake of equating a Presidential "alter ego" with an independent agency like the SEC. Vesting power in alter egos does not infringe the President's prerogatives because such "hand[s] of the President," *In re Sealed Case*, 838 F.2d 476, 528 n.30 (D.C. Cir. 1988) (Ginsburg, J., dissenting), are functionally indistinguishable from the Chief Executive himself. But vesting executive prerogatives in the SEC *does* infringe the President's Article II power because the *raison d'être* of independent agencies is to be free of the President's policy views, *Freytag v. Comm'r*, 501

U.S. 868, 916 (1991) (Scalia, J., concurring), so their control cannot reasonably be equated with Presidential control.

Second, there is nothing to the Board's and panel majority's contention that *United States v. Perkins*, 116 U.S. 483 (1886), authorizes Congress to foreclose Presidential power to remove inferior officers, solely because the Appointments Clause allows it to assign appointment to Department Heads. Bd. Opp. 31-33.[2] As even the Solicitor General acknowledges, *Morrison* holds that the constitutionality of removal restrictions on inferior officers turns on whether the restriction "sufficiently deprives the President of control over the [officer] to interfere impermissibly with his constitutional obligation to ensure faithful execution of the law," *not* on whether the inferior officer is appointed by a Department Head. SG Opp. 27 (quoting *Morrison*, 487 U.S. at 693).

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[2] The Board contends that the court below did not so hold, a distancing effort which is particularly baffling because the court's *Perkins* analysis (Pet. App. 17a, 36a) precisely echoes the argument the Board vigorously advanced below and repeats here (Bd. Opp. 31-33). Since the opinion below in no way suggested that the President could force the SEC to remove Board members, it necessarily held that the President's inability to remove Board members was constitutionally acceptable. And the opinion thought this permissible precisely because, as it stated *twice*, *Perkins* gives Congress plenary power to control removal of inferior officers (Pet. App. 17a, 36a), and "no case" suggests that "good cause is the greatest restriction Congress may impose" (*id.* 36a) or otherwise "prescrib[es] the ways in which Congress can restrict a principal officer's removal of his inferiors" (*id.* 17a).

Third, with respect to *Perkins*, the Solicitor General makes the wholly irrelevant and undisputed point that the "President's power to remove inferior officers ... [may] be restricted, at least where the appointment had been made by an officer of the Executive Branch." SG Opp. 26-27 (quoting *Morrison* 487 U.S. at 723-24 (Scalia, J., dissenting)). But no one challenges, and this case does not involve, good-cause removal restrictions on Executive Branch inferior officers. Such "for cause" restrictions do not unduly impede executive power because, as was cogently explained by the same opinion on which the Solicitor General relies, the inferior officers are "subject to the supervision of principal officers who (being removable at will) have the President's complete confidence" and must follow this supervision because "*for cause*" removal "would include, of course, the failure to accept supervision"—just as the Naval cadet in *Perkins* could be removed for not following a superior's orders. *Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting).

Here, in stark contrast, the President cannot control Board members through a chain of command consisting of alter egos, because the "supervisors" at the SEC do not follow the President's commands on policy and the "inferiors" on the Board cannot be removed for failing to follow the policies of either the President or the SEC. Pet. 19-21.

3. Similarly, the Board's assertion that "the President has no less ability to ensure faithful execution of the laws than he would if Congress had

lodged the Board's functions in the SEC's own staff' (Opp. 27) is fanciful, and contradicts Congress's own judgment that creating the Board *reduced* "Presidential control." Pet. App. 34a. If the SEC performed the Board's functions, those functions would be performed by Commissioners appointed and removable by the President. SEC staff are purely creatures of the Commissioners, and have no statutory authority or existence. Indeed, the Board itself contends that they are not even "officers," but mere "employees." CADC Br. 37. Moreover, all staff are appointed and removable at will by the Chairman. Pet. 38-39. Thus, the President has the same level of control over SEC "staff" as he does over the Chairman, since they are the Chairman's alter egos, and the President can remove the Chairman (as Chairman) at will. Pet. App. 28a-29a.

In stark contrast, the President's level of control over the Board is only that which he enjoys over the New York Stock Exchange, the entity subject to the same "pervasive" SEC oversight purportedly visited on the Board. Bd. Opp. 18. But no one would suggest that the President "supervises" the Exchange by virtue of that SEC oversight. Thus, while "sufficient control" of the SEC necessarily constitutes "sufficient control" of its powerless staff, it in no way constitutes "sufficient control" of an autonomous entity whose members are neither appointed nor removable by the President.

4. With respect to the Appointments Clause, Respondents argue that this case simply involves

"application" of the "direction and supervision" test of *Edmond v. United States*, 520 U.S. 651 (1997), and that the panel correctly applied it. They are wrong on both counts.

First, the panel erred by concluding that "direction and supervision" renders an officer inferior even though, as *Edmond*'s author has emphasized, "to be sure, it is not a *sufficient* condition for 'inferior' officer status that one be subordinate to a principal officer." *Morrison*, 487 U.S. at 722 (Scalia, J., dissenting); *accord* Pet. 33. Among all the powerful offices that would be rendered "inferior" under this misguided standard (Pet. 29), the Solicitor General disagrees only with the characterization of the CIA, but plainly the CIA, like the others, is "supervise[d]" at least as much as the Board is. 50 U.S.C. § 403-4a(b).

Respondents' main argument, again, is that the SEC's purported ability to withdraw some of the Board's *functions* has such an *in terrorem* effect on the Board that it is "functionally equivalent to the removal power" necessary for supervision. Bd. Opp. 28; SG Opp. 17-18. This is wrong because supervision must be of the "officer" personally, not his work product. *Edmond*, 520 U.S. at 667 (Souter, J., concurring); Pet. 32. *Morrison* firmly establishes this fundamental distinction. It holds that the Special Division's power to "define" and "expand" the "scope" of the Independent Counsel's "jurisdiction" (487 U.S. at 679, 680 n.18) and to "terminat[e]" the office (*id.* at 680), "simply does not give the Division

the power to 'supervise' the independent counsel in the exercise of his or her investigative or prosecutorial authority" (*id.* at 681), or otherwise vest any supervisory power even "approaching the power to *remove* the counsel" (*id.* at 682).

The ability to narrow or withdraw an office's jurisdiction does not enable one to supervise the "officer" for the tasks remaining within his jurisdiction, and the "threat" of losing one of the office's responsibilities is not remotely equivalent to the threat of losing one's *job*. If anything, the ability to have the same job with *less* responsibility might well be viewed as desirable, particularly given the Board's exorbitant salaries.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-861

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FREE ENTERPRISE FUND and
BECKSTEAD and WATTS, LLP,
Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
and UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union (ACRU) is a nonpartisan, non-profit legal/educational policy organization dedicated to defending all constitutional rights, not just those which might be politically cor-

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief.

rect or fit a particular ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; Pepperdine Law School Dean, Kenneth W. Starr; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; former Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management, J. Clayburn LaForce.

This case is of interest to the ACRU because we seek to ensure that *all* constitutional rights are fully protected, not just those that may advance a particular ideology. That includes the protections for liberty embodied in the separation of powers.

All parties consented to the filing of this brief, and were timely notified.

INTRODUCTION

The doctrine of separation of powers is not an arcane constitutional technicality. It provides the foundation for the system of checks and balances that the founders carefully crafted to protect American liberties from the danger of overreaching government. It also enforces accountability of public officials in our democracy. Separation of powers, therefore, is one of the fundamental bulwarks of liberty in the American system of government.

Buried in the details of the present case is a precedent for a fundamental change in this system of government. What we have here is not only an independent agency, itself pushing the envelope on separation of powers. We have an agency, the Public Company Accounting Oversight Board, which maintains independence from its only executive oversight authority, which is itself an independent agency, the Securities and Exchange Commission. Moreover, Congress created this scheme precisely to remove the executive functions of the Board from the control and influence of the President.

We submit that this is an impermissible policy choice for the Congress under our Constitution, not an option Congress may choose when it seems to be "in the public interest." The Constitution has already made the choice that the executive functions of our government shall be under the authority of the President. If members of Congress object to that, their only option is to amend the Constitution, not enact a statute redistributing the President's constitutional authority.

This case involves a fundamental invasion of Presidential powers by an overreaching Congress. While the example here seems to involve a relatively technical Board with limited reach, if this executive function can be so thoroughly removed from the President, then others can be as well, with no apparent limiting principle. Ultimately, the President could be reduced to a functionary, with his powers redistributed to self-controlled and self-perpetuating boards and authorities subject only to the oversight of independent agencies, themselves removed from Presidential authority. Any step in this direction undermines the fundamental protections for the li-

berties of the American people embodied in the doctrine of separation of powers.

That is why we agree with Judge Kavanaugh in the dissenting opinion below, where he wrote that this case "is the most important separation-of-powers case regarding the President's appointment and removal powers to reach the courts in the last 20 years." Pet. App. 41a.

STATEMENT OF THE CASE

In response to highly publicized, major corporate failures involving accounting scandals, Congress passed the Sarbanes-Oxley Act ("Sarbox") in 2002. Included in that Act was the creation of the Public Company Accounting Oversight Board ("PCAOB"), granted "massive, unchecked power, by design," to impose and enforce comprehensive regulatory requirements on accounting firms that audit public companies. The PCAOB is composed of five members authorized to carry out its duties by majority vote.

The PCAOB is separated and insulated from Presidential power and authority in the following ways:

> The five PCAOB members are not appointed by the President, but instead are appointed by a majority vote of the Commissioners of the Securities and Exchange Commission ("SEC"). Sarbox Sect. 101(e)(4), (6), 15 U.S.C. Sect. 7211(e)(4), (6). The SEC is itself an independent agency whose activities in carrying out its responsibilities are not subject to the supervision and oversight of the President. Consequently, the President has no supervisory or oversight authority over who the SEC appoints to the PCAOB.

The President also has no authority to remove any of the members of the PCAOB. Only the SEC can remove a PCAOB member, and then only after notice and a hearing, and a finding that the member (i) "has willfully violated" Sarbox requirements, PCAOB rules or the securities laws, (ii) "has willfully abused [his] authority," or (iii) "without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard." Sarbox Sects. 101(e)(6) & 107(d)(3), 15 USC Sects. 7211(e)(6) & 7217(d)(3). Consequently, even the SEC cannot remove PCAOB members for policy disagreements.

The President has no supervisory or oversight authority over the activities of the PCAOB, including the establishment of regulatory requirements *whose willful violation is classified and punished as a felony criminal offense.* Sarbox Sects. 103(a)(1), 15 U.S.C. Sect. 7213(a)(1), 3(b), 15 U.S.C. Sect. 7202(b); 15 U.S.C. Sect. 78ff(a).

The President also has no supervisory or oversight authority, or even influence, over the budget or financing of the PCAOB. The PCAOB sets its own budget, *financed by a tax it is empowered to levy itself on publicly traded companies.* Sarbox Sect. 109(b)-(d), 15 U.S.C. Sect. 7219(b)-(d).

Even the SEC's supervisory or oversight authority over the activities of the PCAOB is limited. The SEC has no control over the targets the PCAOB chooses to investigate, or how it conducts its investigations and regular inspections. Nor can it review the results of any inves-

tigation where no sanctions are imposed. Even where sanctions or imposed, the SEC can modify or cancel them only after notice and a hearing resulting in specific statutory findings. The SEC also has no authority over the PCAOB budget or the taxes it is empowered to impose under Sarbox.

Moreover, the SEC is required to approve any PCAOB rule or regulation "if it finds that the rule is consistent with the requirements of the Act and the securities laws, or is necessary or appropriate in the public interest or for the protection of investors." Sarbox Sect. 107(b)(3), 15 U.S.C. Sect. 7217(b)(3). The SEC can change such a rule or regulation on policy grounds only through notice and comment rulemaking. Sarbox Sect. 107(b)(5), 15 U.S.C. Sect. 7217(b)(5); 15 U.S.C. Sect. 78s(c).

The SEC does hold the power of nullifying or imposing limitations on the activities, functions, and operations of the PCAOB only if after notice and opportunity for a hearing, it finds specific statutorily designated wrongdoing.

Finally, the President's power over the SEC, as an independent agency, is limited as well. While the President does appoint SEC commissioners, he can remove them only for cause, which does not include policy disagreements. Moreover, since the President has no supervisory or oversight authority over the SEC, he has no such authority over how the SEC handles the powers it does have over the PCAOB.

Petitioners Beckstead and Watts, an accounting firm subject to injury by the PCAOB, and Free Enterprise Fund, an organization with members subject to the PCAOB's authority, brought this action seek-

ing a declaratory judgment that the PCAOB is unconstitutional, and an injunction prohibiting the PCAOB from further operations. Pet. App. 8a, 109a-110a.

The district court granted summary judgment for respondents. Pet. App. 112a-117a. The D.C. Circuit Court of Appeals affirmed 2-1, Judge Kavanaugh dissenting. Pet. App. 2a-111a. The full circuit voted 5-4 to deny rehearing *en banc*. Pet. App. 1a.

SUMMARY OF ARGUMENT

The Constitution's careful Separation of Powers structure is one of the fundamental bulwarks of American liberty. This is why faithfully maintaining the Constitution's Separation of Powers is so important.

Yet, under the statute at issue in this case, the President has no role or authority in either appointing or removing the five members of the PCAOB.

The President also has no supervisory or oversight authority over the day-to-day activities of the PCAOB in carrying out its functions, even though the PCAOB even has the power to establish and enforce regulatory requirements *whose willful violation is classified and punished as a felony criminal offense.*

The President also has no role or authority over the budget of the PCAOB, which is set solely by the PCAOB and financed by the power granted in Sarbox to impose, enforce, and administer a tax on publicly traded companies, a power over which the President again has no role or authority.

Even the SEC's supervisory or oversight authority over the activities of the PCAOB is limited. But the President's power over the SEC, which is an inde-

pendent agency, is sharply limited as well. In particular, since the President has no supervisory or oversight authority over the SEC, he has no such authority over how the SEC handles the powers it does have over the PCAOB.

Consequently, the President's power and authority over the PCAOB could not be more thoroughly removed. Judge Kavanaugh rightly characterized the PCAOB in his dissent below as "an independent agency appointed by and removable only for cause by another independent agency" (Pet. App. at 42a), saying also, "[T]his case is *Humphrey's Executor* squared . . . ." (Pet. App. at 42a).

Such thorough removal of Presidential power and authority has not been previously countenanced in our system of government, and cannot be squared with the very concept of Separation of Powers.

Under the Appointments Clause, applying the test established in *Edmond v. United States*, 520 U.S. 651 (1997), the members of the PCAOB must be considered principal officers who must be appointed by the President with the advice and consent of the Senate, given their powers and their independence even from the SEC. Since PCAOB members are appointed by the SEC alone, Sarbox unconstitutionally violates the Appointments Clause as well.

We agree with Judge Kavanaugh who stated in dissent below that this is "the most important separation-of-powers case regarding the President's appointment and removal powers to reach the courts in the last 20 years." Pet. App. 41a. Congress in this case expressly sought to test the outer limits of the Separation of Powers Doctrine, openly proclaiming the creation of a "Fifth Branch of the Federal Gov-

ernment" (Pet. App. at 72) with sharply reduced Presidential control even as compared to "Fourth Branch" independent agencies. Yet, the PCAOB has been granted "massive power, unchecked by design." 148 Cong. Rec. at S6334.

This case consequently presents a dangerous precedent for Congressional authority to rewrite the Constitution and its Separation of Powers, providing for sharply reduced Presidential power and control over its own Executive Branch. We respectfully submit that this Court cannot allow this new threatening development in our law to go forward without at least providing review.

REASONS FOR GRANTING THE WRIT

I. THE PCAOB UNCONSTITUTIONALLY VIOLATES THE SEPARATION OF POWERS DOCTRINE AND THE APPOINTMENTS CLAUSE.

A. The Separation of Powers Doctrine is a Fundamental Bulwark of American Liberties.

As the Court explained in *Buckley v. Valeo,* 424 U.S. 1, 124 (1976),

> "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787. Article I, s 1, declares: 'All legislative Powers herein granted shall be vested in a Congress of the United States.' Article II, s 1, vests the executive power 'in a President of the United States of America,' and Art. III, s 1, declares that 'The judicial Power of the United States, shall be vested in one supreme Court, and in

> such inferior Courts as the Congress may from time to time ordain and establish.'"

Article II further defines the Executive Power in stating that the President shall have the sole power and responsibility to "take care that the laws be faithfully executed."

To enable the President to carry out the Executive Power granted in Article II, Section 1, Article II, Section 2 includes the Appointments Clause, which states,

> "(The President) shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

The Constitution's careful Separation of Powers structure is one of the fundamental bulwarks of American liberty. The separation of the powers of the government into three independent branches stymies any effort to aggregate oppressive power to be imposed on the American people. Oppressors in the legislative branch can only enact oppressive laws. The Executive may still fail to carry out those laws oppressively. Or the Judiciary may still fail to uphold and enforce such laws or their oppressive execution. By contrast, if all of these powers were combined in one force, then a single oppressive impulse could invade the liberties of the American people.

Moreover, the separation of the powers of the state into three separate branches provides the foundation for the system of checks and balances our founders also carefully crafted to protect American liberty. If the legislative branch seeks to adopt oppressive laws, the separate and independent Executive can oppose them and refuse to execute them in an oppressive manner. The separate and independent Judiciary can also refuse to uphold and enforce them, and even strike them down. Or a runaway Executive can be checked by restraining laws adopted by the Legislature, or by the rulings of the Judiciary. But, again, if these powers were combined in one force, these checks and balances would be lost.

As the Court again explained in *Buckley*,

> "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other. As Madison put it in Federalist No. 51:"This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State."

424 U.S. at 122-123.

Finally, with the three fundamental powers of government carefully separated, the conduct of public officials is far more transparent, and they can be far more readily held accountable for their misdeeds. Members of Congress can be held accountable for bad and oppressive laws they enact. Or the President can be held accountable for bad or oppressive execution of the laws, or, more to the point of the present case, for bad, incompetent, or oppressive appointments.

As Judge Kavanaugh wrote in dissent below,

> "The Framers of our Constitution took great care to ensure that power in our system was separated into three branches, not concentrated in the Legislative Branch; that there were checks and balances among the three branches; and that one individual would be ultimately responsible and accountable for the exercise of executive power."

Pet. App. at 46a.

This is why faithfully maintaining the Constitution's Separation of Powers is so important.

B. The Structure of the PCAOB Unconstitutionally Violates the Separation of Powers Doctrine.

As discussed above, the President has no role in appointing the five members of the PCAOB. Sarbox specifically grants that power to the five commissioners of the SEC, itself an independent agency from the Executive Branch and the President. Since the President has no supervisory or oversight authority over the activities or policies of the independent SEC, he has no supervisory or oversight authority over who the SEC appoints to the PCAOB.

The President also has no authority to remove any of the five members of the PCAOB. Again, under Sarbox, only the SEC can remove a PCAOB member, and then only for specific, statutorily defined cause, found after notice and a hearing. Consequently, even the SEC cannot remove PCAOB members for policy disagreements.

The President also has no supervisory or oversight authority over the day-to-day activities of the PCAOB in carrying out its functions. Yet, the PCAOB even has the power to establish and enforce regulatory requirements *whose willful violation is classified and punished as a felony criminal offense.*

The President also has no role or authority over the budget of the PCAOB, which is set solely by the PCAOB and financed by the power granted in Sarbox to impose, enforce, and administer a tax on publicly traded companies, a power over which the President again has no role or authority.

Even the SEC's supervisory or oversight authority over the activities of the PCAOB is limited. The SEC has no role or authority regarding the targets the PCAOB chooses to investigate, how it conducts its investigations and regular inspections, or the results of any investigation where no sanctions are imposed. The SEC can modify or cancel sanctions or penalties imposed by the PCAOB, but only after notice and a hearing resulting in specific statutory findings. The SEC also has no authority over the PCAOB budget or the taxes it is empowered to impose under Sarbox.

The SEC does have the power to change PCAOB rules and regulations on policy grounds after notice and comment rulemaking. It can also nullify or impose limitations on the activities, functions, and op-

erations of the PCAOB, but only after notice and opportunity for a hearing, finding specific statutorily designated wrongdoing.

But the President's power over the SEC, which is an independent agency, is sharply limited as well. While the President does appoint SEC commissioners, he can remove them only for cause, which does not include policy disagreements. Moreover, since the President has no supervisory or oversight authority over the SEC, he has no such authority over how the SEC handles the powers it does have over the PCAOB.

Consequently, the President's power and authority over the PCAOB could not be more thoroughly removed, except maybe if the power of appointment and removal had been granted to the Speaker of the House. Judge Kavanaugh rightly characterized the PCAOB in his dissent below as "an independent agency appointed by and removable only for cause by another independent agency" (Pet. App. at 42a, continuing:

> "[T]his case is *Humphrey's Executor*[2] squared . . . . [U]nder this statute [Sarbox], the President is two levels of for cause removal away from Board [PCAOB] members, a previously unheard-of restriction on and attenuation of the President's authority over executive officers. This structure effectively eliminates any Presidential power to control the PCAOB, notwithstanding that the Board performs numerous regulatory and law enforcement functions at the core of the executive power."

Pet. App. at 42a-43a.

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[2] *Humprhey's Executor v. United States*, 295 U.S. 602 (1935).

Kavanaugh continues,

> "By restricting the President's authority over the Board, the Act renders this Executive Branch agency unaccountable and divorced from Presidential control to a degree not previously countenanced in our constitutional structure.

Pet. App. at 45a. Kavanaugh recognized that removing all Presidential authority and control over the PCAOB was precisely Congress's purpose and intent in Sarbox, saying, "This was not inadvertent; Members of Congress designed the PCAOB to have 'massive, unchecked power.'" *Id.* But under our Constitution, this is an impermissible legislative purpose, as it expressly involves invasion of the President's Executive powers by the Congress. Kavanaugh explains,

> "Our constitutional structure is premised, however, on the notion that such unaccountable power is inconsistent with individual liberty. 'The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom.'"

Id. (Quoting Justice Scalia dissenting in *Morrison v. Olson,* 487 U.S. 654, 727 (1988)). *see also Clinton v. City of New York,* 524 U.S. 417, 450 (1998)(Kennedy, J. concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

Judge Kavanaugh rightly concluded, "The PCAOB contravenes these bedrock constitutional principles, as well as long-standing Supreme Court precedents, and it is therefore unconstitutional." Pet. App. at 46a.

C. The PCAOB Unconstitutionally Violates the Appointments Clause.

The Appointments Clause, quoted above, is essential to the President's Executive powers under the Constitution's Doctrine of Separation of Powers. As the Court explained in *Myers v. United States,* 272 U.S. 52 (1926),

> "The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates . . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication . . . was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws."

Id. at 117. The Court continued,

> "Our conclusion on the merits . . . is that article 2 grants to the President the executive power of the government *i.e.* the general administrative control of those executing the laws, including the power of appointment and removal of executive officers, a conclusion confirmed by his obligation to take care that the laws be faithfully executed . . . ."

Id at 163-164.

Under the Appointments Clause, the members of the PCAOB must be considered principal officers who must be appointed by the President with the advice and consent of the Senate. *Edmond v. United States,* 520 U.S. 651 (1997). As Judge Kavanaugh explained below,

> "They are not inferior officers because they are not 'directed and supervised' by the SEC: The PCAOB members are not removable at will by the SEC, the SEC does not have statutory authority to remove them for failure to follow substantive SEC direction or supervision; and the SEC does not have statutory authority to prevent and affirmatively command, and to manage the ongoing conduct of, Board inspections, Board investigations, and Board enforcement actions. Moreover, as the statutory text demonstrates, the very purpose of this statute was precisely to create an accounting board that would operate with some substantive independence from the SEC, not one that would be 'directed and supervised' by the SEC."

Pet. App. at 44a-45a. Judge Kavanaugh rightly concluded,

> "Because PCAOB members are principal officers under the *Edmonds* test, they must be appointed by the President with the advice and consent of the Senate. The Board members are appointed by the SEC alone; therefore the statute [Sarbox] violates the Appointments Clause as well."

Pet. App. at 45a.

Besides this definitive resolution of the issue, for all of the same reasons just noted above, the SEC cannot be considered the Head of a Department which includes the PCAOB, contrary to the inadequate analysis of the 2-1 majority opinion below. If the SEC were the Head of a Department including the PCAOB, the PCAOB would not have all the independence from the SEC noted by Judge Kavanaugh above.

Moreover, the "the Heads of Departments" referenced in the Appointments Clause clearly refers to senior officials of the President's executive branch, not independent agencies removed from the President's authority. As Judge Kavanaugh stated, "The Supreme Court has recognized that when the head of a department appoints inferior officers in that department, the President technically exercises his removal authority over those inferior officers through his alter ego, the department head." Pet. App. 43a. *See Myers*, 272 U.S. at 133 (referring to "alter ego" of President); *Morrison*, 487 U.S. at 692 (describing Attorney General as President's alter ego for removal of inferior officer by Attorney General); *Ex parte Hennen*, 38 U.S. 230, 259-60 (1839). But an independent agency like the SEC is transparently not the alter ego of the President. That is the whole point of an independent agency.

II. THIS CASE PRESENTS CRITICALLY IMPORTANT QUESTIONS OF LAW GOING TO THE FUNDAMENTAL NATURE OF OUR GOVERNMENT AND ITS PROTECTIONS FOR LIBERTY.

Judge Kavanaugh was correct in stating this is "the most important separation-of-powers case regarding the President's appointment and removal powers to reach the courts in the last 20 years." Pet. App. 41a.

The Separation of Powers Doctrine at issue in this case is one of the fundamental bulwarks of American liberty, creating a basic structure of American government carefully designed to protect the people from oppression due to overreaching government, as discussed above. But in this case, Congress expressly sought to test the outer limits of this Doc-

trine, openly proclaiming the creation of a "Fifth Branch of the Federal Government" (Pet. App. at 72) with sharply reduced Presidential control even as compared to "Fourth Branch" independent agencies. Indeed, as discussed in detail above, the President, who is invested by our Constitution with the Executive powers of our government, has no significant control or authority over the PCAOB of any sort.

Yet, the PCAOB has been granted "massive power, unchecked by design." 148 Cong. Rec. at S6334. These powers include the authority to establish and enforce regulatory requirements whose violations are criminal felonies punishable by imprisonment. It also includes the power to set its own budget financed by special taxes which it has the power to impose.

This case consequently presents a dangerous precedent for Congressional authority to rewrite the Constitution and its Separation of Powers, providing for sharply reduced Presidential power and control over its own Executive Branch. If the PCAOB is approved, especially under the thoroughly inadequate analysis of the 2-1 majority below, then the Congress could remove Presidential authority and control over even more important areas of government, past the independent agencies of the "Fourth Branch" to the brave new world of the "Fifth Branch," where the President is a mere figurehead with no significant role.

Once this trend is begun, there is no apparent limiting principle. Federal education programs could be removed from the President and granted to a remote Federal Board of Education. Then authority over international trade could be removed to a Federal Board of Trade. Authority over labor relations

could be removed to a Federal Labor Board, insulated from the supposedly partisan pressures of Presidential power and authority. Even the prosecution of federal crimes could apparently be transferred to a new Criminal Justice Board. Or the imposition of federal taxes and the need for new federal revenues could be solved by transferring the power of taxation to a new Federal Revenue Board.

We respectfully submit that this Court cannot allow this new threatening development in our law to go forward without at least providing review.

CONCLUSION

For all of the foregoing reasons, we respectfully submit that this Court should reverse the court below and grant the Declaratory Judgment and Injunction requested by Petitioners.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
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Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT
BOARD AND UNITED STATES OF AMERICA,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, assuming that PCAOB members are "inferior Officers" who must be appointed by a "Head" of a department according to the Appointments Clause of the Constitution, the PCAOB's collective appointment by five SEC Commissioners unconstitutional?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of the Petitioners. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a nonprofit, public-interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. Since its establishment in 1977, MSLF has been active in litigation aimed at ensuring that the United States Constitution is interpreted in accordance with the intent of the Framers.

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

MSLF has over 5,000 members throughout the United States. Hundreds of these members are shareholders in various public companies that are subject to regulation by the Sarbanes-Oxley Act. The outcome of this case may have serious consequences for these members if the appointment method for members of the Public Company Accounting Oversight Board ("PCAOB") remains unlawful and unconstitutional.

MSLF believes that its members' interest in the outcome of this case, as well as its knowledge regarding various constitutional guarantees, and its commitment to preserving the Framers' intent are such that its *amicus curiae* brief will assist this Court.

OPINIONS BELOW, JURISDICTION, AND STATEMENT OF THE CASE

Amicus hereby adopts Petitioners' description of the opinions below, statement of jurisdiction, and statement of the case. *See* Pet'r Br. 1-6.

SUMMARY OF THE ARGUMENT

This lawsuit requires an evaluation of the Separation of Powers Doctrine as envisioned by the Framers of the Constitution. It requires an analysis of whether "close enough" is good enough when evaluating the appointment process established by Congress

when creating the PCAOB, or whether the Appointments Clause requires a strict interpretation that heeds the Framers' intent and imparts the plain meaning of the words of the Constitution.

Amicus Curiae MSLF believes that the latter approach is the only appropriate one. The Framers went to exacting lengths to ensure that the Appointments Clause, and the Constitution as a whole, contained structural protections to prevent the abuse of power and thereby preserve liberty. *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). The Appointments Clause represents one of many meticulously-worded sections of the Constitution, in which the meaning of each word is significant and represents an effort by the Framers to preserve the separation of powers. *See* U.S. Const. art. II, § 2, cl. 2. In fact, the Separation of Powers Doctrine has been described as "the heart" of the Constitution, *Buckley v. Valeo*, 424 U.S. 1, 119 (1976), and the Appointments Clause has been labeled as "among the most significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997).

Congress abdicated its responsibility to protect these structural safeguards when drafting the appointment methodology of the PCAOB. As a result, appointment of the PCAOB violated the text of the Appointments Clause as well as the Framers' original intent. Congress's error created an all-powerful, self-funded and self-regulating entity that has no political accountability and whose appointment establishes a

legal precedent for cavalier interpretation of the Appointments Clause in the future.

ARGUMENT IN SUPPORT OF THE PETITION

I. CONGRESS VIOLATED THE CONSTITUTION WHEN IT VESTED THE APPOINTMENT OF THE PCAOB IN THE SEC COMMISSIONERS.

The Appointments Clause provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

The Framers structured the Appointments Clause to "preserve political accountability relative to important government assignments." *Edmond*, 520 U.S. 659. *See also* The Federalist No. 76 (Alexander Hamilton) in *The Famous Papers on the Principles of American Government*, 480-84 (Benjamin Fletcher Wright, ed., 1961) ("The Federalist No. 76"). The

Framers sought to achieve this accountability by establishing a preference for single-headed appointment authority. *See* Michael J. Gerhardt, *The Federal Appointments Clause*, 1-44 (2000), The Federalist No. 76, 480-84. As a result, the Constitution requires that "ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States" be appointed by the President, solely. U.S. Const. art. II, § 2, cl. 2. It also limits Congress's ability to vest appointment authority in "the President alone, in the Courts of Law, or in the *Heads of Departments*." *Id.* (emphasis added). This emphasis on single-headed appointment authority reflects the Framers' confidence in the integrity of an appointment done by a single person, as well as the Framers' doubt in the reliability of an appointment made by a group. The Federalist No. 76, 480-89.

The Framers believed that a single person was more accountable than a group. *See generally* The Federalist No. 76, 480-84. In The Federalist Papers, Hamilton explained that a single individual has a "livelier sense of duty and a more exact regard to reputation" than a group, and possesses "stronger obligations . . . to investigate with care" a potential appointee's qualifications and reputation. *Id.* at 481. An individual also has "fewer personal attachments to gratify" and is "less liable to be misled by the sentiments of friendship [or] affection . . . [or] distracted and warped by [diverse] views, feelings, and interests which frequently distract and warp the resolutions of a collective body." *Id. See also* Ross E.

Weiner, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN. L. REV. 363, 395-96 (2001).

This confidence in appointment by a single person contrasts sharply with the Framers' doubts in the trustworthiness of any selection by a group. *See* The Federalist No. 76, 480-89. Hamilton explained that a collective body "[could not] be regulated" because of a "systematic spirit of cabal and intrigue" and cautioned that a group's decision would always be the result of a "bargain" among the parties, instead of a selection based on the qualifications of the appointee. *Id.* at 481. He noted that "likings and dislikes, partialities and antipathies, attachments and animosities" would influence the decision-making process and, ultimately, the appointment would come only from "a victory gained by one party over the other, or [from] a compromise between the parties." *Id.* Hamilton explained that a collective appointments process would ultimately devolve into a perverse compromise in which the qualifications that unite the votes of the collective body would supersede those that qualified the candidate for the position. *Id.* Rarely will "the advancement of the public service . . . bet the primary object either of party victories or party negotiations." *Id.* Instead, a collective appointment process "would be productive of an increase of expense, a multiplication of the evils which spring from favoritism and intrigue in the distribution of public honors, a decrease in the stability of the administration of the government. . . ." *Id.* at 487-88.

The Framers therefore sought to limit the nature and number of persons who could participate in the appointments process. In this way, they sought to prevent an unaccountable diffusion of power among political entities. *Freytag*, 501 U.S. at 884. *See also* Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, *80* NOTRE DAME L. REV. 975, 1049-59 (2005)

The Supreme Court has recognized this goal and noted that:

> [t]he Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government.

Freytag, 501 U.S. at 885. The Supreme Court has characterized the appointment power as "the most insidious and powerful weapon of eighteenth century despotism." *Buckley v. Valeo*, 424 U.S. 1, 143 (1976). The Court has also described the "manipulation of official appointments" as "one of the American revolutionary generation's greatest grievances against executive power." *Freytag*, 501 U.S. at 883, *citing Buckley*, 424 U.S. at 96 (internal citation omitted). The Appointments Clause allows "Congress only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law." *Freytag*, 501 U.S. at 884.

By constraining appointment power to a limited number of identifiable individuals, the Framers sought to preserve political oversight and democratic accountability. Single-headed appointment authority ensures that the decision-making process is transparent and focused on the qualifications of the appointee. It also ensures that the individual who makes the appointment can be easily identified if the appointee fails in his duties or if the appointment process becomes otherwise corrupted. The structure of the Appointments Clause ultimately preserves the separation of powers of the federal system because it ensures that democratic principles govern the selection of non-elected officials. *Id.* at 878.

II. THE SELECTION OF THE PCAOB VIOLATED BOTH THE LETTER AND THE SPIRIT OF THE APPOINTMENTS CLAUSE.

A. The PCAOB, by design, has massive, unchecked power.

Created in 2002 as part of the Sarbanes-Oxley Act, the PCAOB is a self-funded and self-regulating entity that can inspect, investigate, and punish accounting firms for violations of PCAOB rules or other federal laws. 15 U.S.C. §§ 7211-19. *See also* PCAOB homepage available at http://www.pcaobus.org/Enforcement/index.aspx (last accessed February 4, 2009). In addition to these investigative and punitive powers, the PCAOB can also promulgate binding rules and auditing standards, 15 U.S.C. § 7202, and

provides for its own funding by levying a tax on the nation's public companies. 15 U.S.C. § 7219.

Congress endowed the PCAOB with these significant powers after a series of high-profile accounting scandals shook public confidence in the accounting industry. Congress sought to "protect investors and the public interest by promoting informative, fair, and independent audit reports." PCAOB homepage available at http://www.pcaobus.org/Enforcement/index.aspx (last accessed February 4, 2009). In an effort to "crack down" on the misleading accounting practices, auditor conflicts of interest, and other forms of accounting fraud that had plagued the accounting industry, Congress deliberately tried to insulate the PCAOB from outside political pressure to ensure its autonomy. *Accounting Reform and Investor Protection: Hearings on the Legislative History of the Sarbanes-Oxley Act of 2002: Accounting Reform and Investor Protection Issues Raised by Enron and Other Public Companies Before the S. Comm. On Banking, Housing and Urban Affairs*, 107th Cong. 44 (2002) (testimony of Arthur Levitt, former Chairman of the SEC). As one Senator noted:

> This board is going to have massive power, unchecked power, by design . . . We are setting up a board with massive power that is going to make decisions that affect all accountants and everybody they work for, which directly or indirectly is every breathing person in this country. They are going to have massive unchecked powers.

Nagy, at 1003, *quoting* 148 Cong. Rec. S6334 (daily ed. July 8, 2002) (statement of Sen. Gramm).

B. The appointment of the PCAOB violated the text of the Appointments Clause.[2]

The first and perhaps most obvious defect in the appointment of the PCAOB is that the process violates the plain meaning of the Appointments Clause. The Appointments Clause provides that inferior officers are to be appointed by the head of a department. U.S. Const. art. II, § 2, cl. 2. The plain meaning of "head" is "[a] chief; a principal person; a leader, a commander; one who has the first rank or place, and to whom others are subordinate; as the head of an army; the head of a sect or party." Noah Webster, *An American Dictionary of the English Language* (New York, S. Converse 1828). However, the PCAOB is not appointed by an individual head of a department. Instead, the PCAOB is appointed by the SEC Commissioners, who must collectively select the PCAOB chairperson and initial members of the PCAOB. 15 U.S.C. § 7211(e). This collective selection process is contrary to the plain language of the Appointments Clause because the five SEC Commissioners are not

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[2] Appellant's brief discusses at length whether the PCAOB's members are principal officers within the meaning of the Appointments Clause. *See* Pet'r Br. 27-35. This *amicus curiae* brief will therefore only address the PCAOB's appointment as inferior officers.

the "Head" of the SEC. Likewise, the SEC Commissioners would not qualify as a "Head" according to the original intent of the Framers. U.S. Const. art. II, § 2, cl. 2. *See generally* The Federalist No. 76.

The "Head" of the SEC is most appropriately the SEC Chairman. The Chairman is responsible for the executive and administrative functions of the SEC, including appointment and supervision of personnel employed by the Commission, internal business of the Commission, and the use and expenditure of funds. *See SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988). Moreover, the SEC itself recognizes that the Chairman is the SEC's chief executive officer. Securities and Exchange Commission website, available at http://sec.gov/about/whatwedo.shtml#org (last accessed Feb. 4, 2009).

In fact, viewing the Chairman as the head of the SEC makes sense given the Framers' intent when drafting the Appointments Clause. *See* The Federalist No. 76. The SEC Chairman serves at the pleasure of the President and therefore has direct political accountability to the President for appointment of PCAOB members. The President, in turn, is accountable to the public for his selection of the SEC Chairman. If however, the SEC Commissioners can collectively be considered the "Head" of the SEC, no single individual is answerable for his or her choice. The political accountability sought by the Framers cannot be achieved in this way. *Id.*

Given the Framers' original intent, it is illogical that the five SEC Commissioners are the "Head" of the SEC because the Framers would not have diffused the appointment power in such a way. The "Framers recognized the dangers posed by an excessively diffuse appointment power," and sought to limit it to a single person. *Freytag*, 501 U.S. at 885. An individual has "fewer personal attachments to gratify" and is "less liable to be misled by the sentiments of friendship [or] affection . . . [or] distracted and warped by [diverse] views, feelings, and interests which frequently distract and warp the resolutions of a collective body." The Federalist No. 76, at 481. It therefore strains the imagination to think, that given the Framers' deep distrust for appointment by committee, they would have used the phrase "Heads of Departments" to enable appointment by group. *Id.*

C. The selection of the PCOAB violated the spirit of the Appointments Clause because appointment by a collective body is inherently corrupt.

Not surprisingly, the PCAOB's appointment process was a messy experiment in federal appointment authority that bore out the problems anticipated by the Framers. As the Framers would have anticipated, the selection of the PCAOB was "warped by [diverse] views, feelings, and interests . . . of a collective body." *Id.*

In 2002, the Government Accountability Office ("GAO") investigated the PCAOB appointment process "amid allegations that the SEC Chairman withheld relevant information from the other Commissioners concerning the suitability of the newly appointed PCAOB chairman. . . ." Government Accountability Office, *Securities and Exchange Commission, Actions Needed to Improve Public Company Accounting Oversight Board Selection Process*, 21 (Dec. 2002) *available at* http://www.gao.gov/new.items/d03339.pdf (last accessed Feb. 4, 2009) ("GAO Report"). The Report described a "breakdown" in the PCAOB selection process due to a lack of consensus among the Commissioners. *Id.* at 2-3. It indicated that infighting among the Commissioners resulted in delay, a haphazard selection process, and ultimately, inadequately vetted appointees. *Id.* It concluded that "the biggest impediment to the smooth functioning of the selection process was a lack of initial consensus among the Commissioners and key SEC staff on the selection process." *Id.* at 20.

As the Framers anticipated, the collective appointment of the PCAOB "had fallen easy prey to demagogues, provincialism and factions." Gerhardt, at 18. "[E]ach member [had] his friends and connections to provide for, and the desire for mutual gratification [begat] a scandalous bartering for votes and bargaining for places." The Federalist No. 76, at 487. As a group, the SEC was unable to "agree [upon a] process for screening candidates before they were interviewed and appointed by the Commissioners." GAO Report,

at 5. Furthermore, the group was unable to "determine how and what information would, and should, have been developed and passed along for their consideration as they deliberated about candidates." *Id.*

This breakdown in the appointment process was not a victimless no-harm-no-foul technicality. The multi-headed appointment procedures used by the SEC offended the plain language of the Appointments Clause and ignored the elementary principles that the Framers sought to preserve. *See* Gerhardt, at 28. As a group, the SEC Commissioners had no individual responsibility for the PCAOB appointments, or for the chaotic and unreliable process through which they were selected. Perhaps most disturbingly, the SEC Commissioners bear no individual responsibility for the future actions of their appointees. When an individual selects an appointee, his motives and methodology, if not overtly clear, can be discovered through investigation into that person's background, motives, and history. *See* The Federalist No. 76, at 480-84. But when a group, such as the SEC Commissioners, selects a candidate, the individual motives and methodology for their selections are obscured.

The district court held that "since the SEC Chairman has voted for each PCAOB member" the Plaintiff-Appellees' injury was not traceable to the improper PCAOB appointment process – essentially that the errors in the PCAOB appointment process were a no-harm-no-foul technicality. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 2007 WL

891675 at *5 (D.D.C. 2007). It is impossible to know, however, what bargains were struck and/or what political favors were exchanged as the SEC Chairman bargained, albeit unsuccessfully, with the other Commissioners to reach a consensus on the makeup of the Board. Failure to follow the structure of the Appointments Clause rendered the selection process itself corrupt. In fact, no one, except perhaps the SEC Chairman, knows whether he would have voted for the same individuals had he appointed them on his own. This inability to dissect the appointments process and hold one individual accountable for his choice is exactly why the Framers placed appointment authority in one person – the "Head" of a department. U.S. Const. art. II, § 2.

III. THE PCAOB IS POLITICALLY UNACCOUNTABLE TO BOTH THE LEGISLATIVE AND EXECUTIVE BRANCHES.

The PCAOB is a powerful, self-funding and self-regulating entity that is not accountable either to the Legislative Branch or to the Executive Branch. The power of the PCAOB is limited only by the SEC Commissioners, who themselves are one generation removed from the democratically-elected office of President. The PCAOB cannot be disciplined nor controlled by the President, nor can the PCAOB be disciplined or controlled by the SEC Chairman through the President. Rather, the PCAOB is overseen by a group of SEC Commissioners whose

authority and accountability are buried in layers of bureaucracy.

If the PCAOB were selected by the SEC Commissioner, the PCAOB would at least be responsive to the wishes of the Executive Branch. Bad behavior or corruption by the PCAOB could be attributed directly to the SEC Commissioner and his poor selection. Instead, mismanagement or corruption by the PCAOB can be managed only via a bureaucratic review process involving five SEC Commissioners. The horse-trading and lack of accountability that occurred with the selection of the PCAOB will occur again if the PCAOB or its members must be investigated or fired.

Congress by failing to establish political accountability for the PCAOB, has abdicated its responsibility to preserve the separation of powers. While Congress has the authority to enact powerful laws to address perceived national emergencies, Congress cannot exceed the powers granted to it in the Constitution. Although Congress's efforts to ensure that the PCAOB is an autonomous entity insulated from political pressure are perhaps laudable, in this case, Congress went too far. The selection of the PCAOB violated the text of the Constitution and the original intent of the Framers. The result of this mistake removes the PCAOB from any political accountability and offends the Separation of Powers Doctrine. *See* U.S. Const. art. II, § 2, cl. 2.

CONCLUSION

For the reasons set forth above, *Amicus Curiae* MSLF respectfully requests that this Court grant Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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AMICUS CURIAE BRIEF ON THE MERITS OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, FREE ENTERPRISE FUND AND BECKSTEAD AND WATTS, LLP

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AMICUS CURIAE BRIEF ON THE MERITS OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, FREE ENTERPRISE FUND AND BECKSTEAD AND WATTS, LLP

Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief on the merits on behalf of itself and its members in support of Petitioners, Free Enterprise Fund and Beckstead and Watts, LLP.[1]

INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest law firm organized under the laws of the State of Colorado with more than 5,000 members. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government.

MSLF has long been active in litigation aimed at ensuring that the Constitution is interpreted in

[1] Pursuant to Supreme Court Rule 37.3(a), counsel of record states that the parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

accordance with its text, the intent of the Founders, and the political theories informing that intent. MSLF believes that the United States Court of Appeals for the District of Columbia Circuit has departed from that principle. In this brief, MSLF will attempt to persuade this Court that it should return to this principle of constitutional construction by overruling a line of cases that has departed from this principle. In so doing, this Court must reverse the District of Columbia Circuit Court of Appeals and hold that the Congress unconstitutionally created the Public Company Accounting Oversight Board ("PCAOB") in violation of the Doctrine of Separation of Powers.

INTRODUCTION

The plain language of the United States Constitution vests all federal executive power in the President of the United States, subject only to specific constitutional limitations. That power is plenary. The intent of the Founders and the political theory of their day support that conclusion. The Constitution provides no power to Congress to control or condition the removal of officers or employees who implement, administer, or carry out the laws of the United States; that power is vested solely in the President. Certain cases of this Court that do not support this principle should be overruled and the decision of the District of Columbia Circuit Court of Appeals in the case at issue should be reversed.

MSLF does not believe that this Court *must* overrule any prior cases in order to find that Congress's creation of the PCAOB violates either the Doctrine of Separation of Powers or the Appointments Clause. In that regard, MSLF agrees with Petitioners. MSLF believes, however, that the jurisprudence of this Court has for many years departed from both the constitutional text and the intent of the Founders regarding Congress's power to create independent agencies and to limit the executive power of the President with respect thereto.

This case presents this Court with a prime opportunity to revisit the issue of independent agencies and to correct the wrong constitutional turn taken by this Court in prior years. Under current law, all Congress need do is determine that an agency executing the laws of Congress should be independent of the President and it may make it so. Under that jurisprudence, the President becomes no more than a minion of Congress, acting in accordance with Congress's directives. This Court must end the current practice of unguided, ad hoc determinations, lacking justiciable standards, to decide the constitutionality of Congress's incursions into executive authority through its creation of independent agencies.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE UNITED STATES CONSTITUTION VESTS ALL EXECUTIVE POWER IN ONE PERSON, THE PRESIDENT.

The first three Articles of the Constitution of the United States delineate the structure of the government of the United States. The Founders believed that all governmental power consist of only three categories – legislative, executive, and judicial – that is reflected in the Constitution, which vests these powers in three separate, distinct, and co-equal divisions of government:

> All legislative Powers *herein granted*, shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. art. I, § 1 (emphasis added).

> The executive Power *shall be vested* in *a* President of the United States of America.

U.S. Const. art. II, § 1 (emphasis added).

> The judicial Power of the United States *shall be vested* in one Supreme Court and such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const. art. III, § 1 (emphasis added).

At issue here is the nature and the extent of the power vested by the Constitution in the executive

branch and the degree to which, if at all, Congress may intrude upon that power. The Constitution of the United States unambiguously vests *all* executive power in one person, the President of the United States. This plenary power must, of necessity, include the power to execute, enforce, administer, carry out, and implement the laws of the United States enacted by Congress, and to appoint, remove, control, and supervise the officers, inferior officers, and employees who engage in those functions. In contrast, the Constitution vests Congress with legislative powers only as "herein granted." Unlike the President, Congress "can exercise only the powers granted to it" in other sections of the Constitution. *McCulloch v. Maryland*, 4 U.S. (4 Wheat) 316, 405 (1819).

Looking at the first three Articles together is informative in understanding the constitutional structure. Articles II and III resemble one another more than either resembles Article I. Neither of those Articles contains a "herein granted" provision, and both are vested with complete power in their respective spheres of government. Section 2 of these Articles differs, however. Section 2 of Article III begins with the limiting phrase, "The judicial power shall extend to. . . ." This phrase makes it clear that the enumerated jurisdictional powers that follow are exclusive. No such limiting phrase exists in Section 2 of Article II, however. Rather, that Section merely places limits on particular executive powers granted by Section 1 of Article II but does not otherwise limit the plenary executive power granted by Section 1. For

example, certain presidential appointments and treaties require the consent of the Senate, the power of pardon does not extend to impeachment, only Congress may declare war or issue letters of marquee and reprisal, and Congress may vest appointment of inferior executive officers, without Senate consent, in the President, Judiciary, or department heads. U.S. Const. art. II, § 2.

These limits constitute the exclusive powers of Congress to check the plenary executive power of the President, which necessarily includes all power over removal, or the conditions of removal, of executive officers and employees, principal or inferior, irrespective of who may have appointed them. Thus, all power to control and supervise after appointment is solely executive and vested in the President.

This clear and unambiguous constitutional structure does not provide for or contemplate the burgeoning "independent agencies" that owe their existence and the tenure of their officers to Congress rather than the President. Indeed, in some cases, as here, these agencies are essentially independent of any of the three branches of government. Nor does the Constitution's plain language permit the creation of so-called "quasi" powers, such as quasi-judicial or quasi-legislative power. Under the Constitution's clear language, there are only three powers, which the Constitution divides solely among the three separate and distinct branches of government, subject only to the very limited blending of powers specifically provided for to allow each branch the

ability to check and moderate the others, as discussed infra.

Thus, the plain language does not allow a governmental body to be part of more than one branch of government. The Constitution provides Congress with no power to vest implementation of its laws in any other than the executive branch, the sole person responsible for which is the President, even though the legislation contemplates some rule-making or adjudication. Under the plain language of the Constitution, a power is executive if it enforces, carries out, implements, or executes congressional legislation or controls and supervises those who do so.

II. THE POLITICAL THEORY ON WHICH THE FOUNDERS BASED THE STRUCTURE OF THE CONSTITUTION SUPPORTS AND REINFORCES THE PLAIN LANGUAGE OF THE CONSTITUTION.

The political theories of government employed by the Founders support and reinforce the plain language of the Constitution. The concept of government and political theory employed by the Founders in drafting the Constitution is set forth in *The Federalist*:

> [T]he authors of the Publius letters set forth more comprehensively, and in a form more nearly final than is elsewhere found, theories reflective of the course of constitutional government and theory in this country up to 1787.

The Federalist at 77 (Benjamin Fletcher Wright ed., 1961). Central to this understanding is the concept that government must be composed of separate and balanced departments, whose powers are blended just enough that each will check and moderate the others, thus endowing the people with a maximum degree of liberty.

A. The Legislative Branch Is The Most Powerful Branch And The One Most Likely To Encroach On The Powers Of The Others, Requiring More Checks And Balances On Its Power.

The Founders believed that concentration of governmental power leads to tyranny and that dispersal of this power is necessary to preserve liberty. But the Founders also believed that, because complete separation of the branches could lead to tyranny, there must be a limited blending of powers among the branches, thus allowing each branch to check and moderate the others. The branch most capable and most likely to draw power to itself and, therefore, requiring more checks from the other branches, is the legislative. This is demonstrated in discussions in *The Federalist* Nos. 47, 48, and 51 (James Madison).

Madison wrote that "the accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny." *The Federalist* No. 47 at 336 (James Madison)

(Benjamin Fletcher Wright ed., 1961). "The powers that properly belong to one of the departments ought not to be directly and completely administered by either of the other departments" because "*power is of an encroaching nature, and . . . ought to be effectually restrained from passing the limits assigned to it.*" *The Federalist* No. 48 at 343 (James Madison) (Benjamin Fletcher Wright ed., 1961) (emphasis added).

Madison then laid out the structure by which the Constitution "maintain[s] . . . the necessary partition of power among the several departments. . . ." *The Federalist* No. 51 at 355 (James Madison) (Benjamin Fletcher Wright ed., 1961). The Constitution, Madison explained, recognizes that the "separate and distinct exercise of the different powers of government . . . is . . . essential to the preservation of liberty." *Id.* Indeed, "each department should have a will of its own [and] should be so constituted that the members of each should *have as little agency as possible in the appointment of the members of the others.*" *Id.* (emphasis added).

Therefore, in setting up these independent co-equal departments, the Constitution so "contriv[es] the interior structure of government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." *Id.* Thus, "the great security against a gradual concentration of the several powers in the same department consists in *giving those who administer each department the necessary constitutional means and personal motives to resist the*

encroachments of the others." *Id.* at 356 (emphasis added). In other words, to control and moderate each other the branches must "be so far connected as to give to each a constitutional control over the others." *The Federalist* No. 48 at 343 (James Madison) (Benjamin Fletcher Wright ed., 1961). Because some branches of government are more powerful than others, "some more adequate defense is indispensably necessary for the more feeble, against the more powerful, members of the government." *Id.*

Madison identified the legislative branch as the most powerful, stating, "The legislative department is *everywhere extending the sphere of its activity*, and *drawing all power into its impetuous vortex.*" *Id.* (emphasis added). In fact "it is *against the enterprising ambition* of [the legislative] department that the people ought to indulge all their jealousy and *exhaust all their precautions.*" *Id.* at 344 (emphasis added). Madison believed that the executive branch required protection and self-defense mechanisms against an overreaching legislative branch:

> Its constitutional powers being at once more extensive, and less susceptible of precise limits it can, with the greater facility, *mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments*. . . . Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other

> departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.

Id. at 344-45 (emphasis added).

The case before this Court demonstrates just how overreaching and enterprising Congress is and the foresight of the Founders. In establishing the PCAOB, Congress engaged in unconstitutional encroachment on the executive branch through a complicated and indirect measure that attempts to draw executive power into its "impetuous vortex." Congress attempted to eviscerate the power of the President by the creation of not only the PCAOB, but of all other agencies independent of the President's supervision and control.

These power grabs demonstrate unequivocally why the provisions for self-defense of the executive must "be made commensurate to the danger of attack." *The Federalist* No. 51 at 356 (James Madison) (Benjamin Fletcher Wright ed., 1961). Because "ambition must be made to counteract ambition" the Constitution puts in place a system "of opposite and rival interests. . . ." *Id.* "[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other – that the private interest of every individual may be a sentinel over the public rights." *Id.*

Madison, once again recognizing the predominance of the legislative branch, opined, "It is not possible to give each department an equal power of

self-defense, [because] in republican government, the legislative authority predominates." *Id.* He explained that the "the remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions . . . will admit." *Id.* at 357. But even more precautions may be needed "against still further dangerous encroachments [by the legislature]." Accordingly, "as the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require . . . that it should be fortified." *Id.* Thus, it is the aim of the Constitution that "different governments will control each other, at the same time that each will be controlled by itself." *Id.*

Madison's writings demonstrate that the Founders greatly distrusted the legislative branch and its ability to, and predilection for, restricting executive power and drawing all power to itself. They make clear that legislation that in any way intrudes upon the power of the President must be examined carefully and with skepticism to determine whether the legislature is encroaching on the executive power.

B. The Constitution Vests All Executive Power In One Person.

The protection of the executive power requires vesting all such power in one person, the President. Alexander Hamilton discusses the reasons therefor in

The Federalist Nos. 69, 70, 71, and 76 (Alexander Hamilton). He first explains that Article II, § 2, by providing limitations on the executive power, distinguishes the President from the King of Great Britain, who possessed far more formidable powers. *The Federalist* No. 69 (Alexander Hamilton). Hamilton also emphasizes the need to rigidly control the Congress, using the strongest, most emphatic language found in *The Federalist* to describe the corruptive and intrusive nature of the power in the legislature:

> To what purpose separate the executive . . . from the legislative, if . . . the executive . . . [is] so constituted as to be at the absolute devotion of the legislative? . . . The *tendency of the legislative authority to absorb every other*, has been fully displayed and illustrated by examples in some preceding numbers. In governments purely republican, this tendency is almost irresistible. The *representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves*, and betray strong *symptoms of impatience and disgust at the least sign of opposition* from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an *imperious control over the other departments*; and as they commonly have the people on their side, they always *act with such momentum as to make it very difficult*

> *for the other members of the government to maintain the balance of the Constitution.*

The Federalist No. 71 at 460 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (emphasis added).

C. One Person Promotes The Necessary Energy Needed By The Executive Branch And The Responsibility To The People That Is Critical To Preserve Liberty.

1. The executive branch requires energy.

In *Federalist* No. 70 Hamilton explains that it is essential to vest all the executive power in one person because that promotes both energy and safety, or responsibility, the two most important and necessary characteristics of executive power. "Energy in the Executive is a leading character of the definition of good government." *The Federalist* No. 71 at 451 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). Energy equates to "decision, activity, secrecy, and dispatch." *Id.* at 452.

"Unity [of executive power] is conducive to energy." *Id.* at 451-52. The elements of energy "will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished." *Id.* at 452. This is so because "wherever two or more

persons are engaged in any common enterprise . . . there is always the danger of difference of opinion." *Id.* at 453. Such dissension "counteracts those qualities in the Executive which are the most necessary ingredients in its composition, vigor and expedition. . . ." *Id.* at 454.

2. Responsibility of the President to the people is an essential element of executive power.

Safety is the other ingredient the executive branch must provide and requires, "in a republican sense . . . a due dependence on the people, and secondly a due responsibility [to the people]." *Id.* at 452. The "weightiest objections to a plurality of the Executive . . . is that it *tends to conceal faults and destroy responsibility*." *Id.* at 455 (emphasis added). Hamilton explained the criticality of responsibility placed in a single executive:

> It is evident from these considerations, that the plurality of the Executive tends to deprive the people of the *two greatest securities they can have for the faithful exercise of any delegated power, first*, the *restraints of public opinion*, which lose their efficacy . . . ; and, *secondly*, the *opportunity of discovering with facility and clearness the misconduct of the persons they trust*, in order either to their removal from office or to their actual punishment. . . .

Id. at 456 (emphasis added).

Thus, "in a republic . . . every magistrate ought to be personally responsible for his behavior in office. . . ." *Id.* "In the American republic . . . responsibility that does not rest on the shoulders of a single person . . . would serve to destroy . . . the necessary responsibility of the Chief Magistrate himself." *Id.* at 457. Accordingly, "the executive power is more easily confined to one [and] it is *far more safe there should be a single object for the jealousy and watchfulness of the people.*" *Id.* (emphasis added).

Hamilton then explained the great danger to political responsibility when all power is not concentrated in one person, as exemplified and demonstrated by the PCAOB:

> When power . . . is placed in the hands of so small a number of men as to admit of their views being easily combined in a common enterprise . . . it *becomes more liable to abuse, and more dangerous when abused, that if it be lodged in the hands of one man; who from the very circumstances of this being alone, will be more narrowly watched and more readily suspected. . . .*

Id. (emphasis added). The PCAOB is just such a body in which great powers are concentrated and in which no responsibility can be assigned by the people for its abuse.

Thus, the structural components of the Constitution require that all exercise of all executive power be vested in one person who is politically accountable to

the people. The PCAOB violates this critical principle of liberty by concentrating power in a few, not responsible to any branch of government, even the President.

D. Independent Agencies Are Anathema To Constitutional Structure.

The concept of independent agencies, plural bodies of persons wielding executive power, over whom the President exercises little if any control or supervision, is anathema to the structure of the Constitution. The Founders intended that no executive activity be "independent" of or free from political accountability. However laudable the goals for independence from the President may arguably be, the plain language of the Constitution, supported by the political theories on which it is based, does not allow it. Consequently, there is no place under the Constitution for the Securities and Exchange Commission ("SEC"), much less the PCAOB, which the SEC appoints and "supervises," unless the President has the power of removal from those bodies at will.

Thus, whenever Congress creates an executive agency to exercise any executive function, it unconstitutionally transfers executive power from the President and thereby brings executive functions under its own domination and control, or at least removes them from control of the President. This is a clear violation of the Doctrine of Separation of Powers and flies in

the face of the constitutional structure so meticulously spelled out in the Constitution.

III. CASE LAW SUPPORTS THE PROPOSITION THAT ALL EXECUTIVE POWER IS VESTED IN THE PRESIDENT BUT UNACCOUNTABLY RECOGNIZES MORE POWER IN CONGRESS THAN IS SUPPORTED BY THE CONSTITUTIONAL TEXT.

A. *Myers v. United States* Correctly Holds That Section 1 Of Article II Vests All Executive Power, Including Removal Power, In The President, And That The Blended Powers Of Congress, Contained In Section 2 Of Article II, Should Be Strictly Construed And Not Be Extended By Implication.

The case of *Myers v. United States*, 272 U.S. 52 (1926) presented this Court with an opportunity to confirm that the executive power is plenary and vested in the President by Section 1 of Article II of the Constitution. It also established that removal power is included within that power. At issue was whether the President could remove at will a postmaster appointed to a four-year statutory term by the President with the advice and consent of the Senate. Chief Justice Taft, writing for the Court, stated the issue before the Court: "This case presents the question whether under the Constitution the President has the exclusive power of removing the

executive officers of the United States whom he has appointed by and with the advice and consent of the Senate." *Id.*, at 60. The Court answered this question in the affirmative.

In his analysis, the Chief Justice engaged in a lengthy and detailed examination of the powers of the President based on the legislative history, *The Federalist* and other writings of the Founding Fathers, actual practice and opinions of various Attorneys General, and case law. He also reviewed extensively the impeachment trial of President Andrew Johnson for removing executive officer contrary to the will of Congress. His analysis resulted in a thoroughly reasoned 70-page opinion. Finding little history of the discussion of the removal power in the records of the Constitutional Convention, the Chief Justice resorted to an intensive and thorough examination of a debate in the First Congress, a debate characterized as "one of the ablest constitutional debates which has taken place in congress since the adoption of the constitution." *Parsons v. United States*, 167 U.S. 324, 329 (1897). Further elaborating on what is often referred to as the "Legislative Decision of 1789," *Parsons* found:

> [The debate] lasted many days, and all arguments that could be thought of by men, many of whom had been instrumental in the preparation and adoption of the constitution were brought forward in the debate for and against that construction of the instrument

> which reposed in the President alone the power to remove from office.

Id.

James Madison occasioned this debate when he moved in the House of Representatives to create certain offices answerable to the President. Included in his motion was the statement that these officers were "removable by the President." *Myers*, 272 U.S. at 112. A discussion then ensued concerning whether to strike the clause referring to the President's removal power. *Id.* Congress retained the language, voting 34-20. *Id.* Some time later, a Member objected to the clause vesting removal power in the President because that Member believed that inclusion might be construed to imply that the removal power was derived from the legislature when, in fact, it is granted in the Constitution by Section 1 of Article II. *Id.* James Madison, on hearing this objection, agreed with the reasoning and constitutional interpretation of that Member. *Id.* at 113. The House also agreed with this interpretation, deleted the removal clause by a vote of 31-19, and referred the bill to the Senate, where the vote was 10-10; Vice President Adams provided the vote necessary to pass it. *Id.* at 114-15.

In the course of his opinion, Chief Justice Taft had occasion to review statements made by James Monroe and Alexander Hamilton, among many others. For example, "Mr. Madison insisted that Article 2, by vesting the executive power in the

President, intended to grant to him the power of appointment and removal of executive officers except as thereafter expressly provided in that article." *Id.* at 115. This strongly supports the plain language of the Constitution, and his own writings in *The Federalist*, that Section 1 of Article II vests all executive power in the President, whereas Section 2 merely places some limitations on certain powers so granted by blending very limited blended powers of Congress in that Article.

Chief Justice Taft noted that Hamilton, during his tenure as Secretary of the Treasury in Washington's cabinet, strongly believed in Monroe's interpretation.[2] *Id.* at 137. Indeed, Hamilton wrote that a complete list of executive powers were too many to grant other than in a very general, plenary grant. Hamilton's writings are sufficiently persuasive to require setting out extensively here, as did Chief Justice Taft:

> The *second article of the Constitution of the United States section first, establishes this general proposition, that "the Executive Power shall be vested in a President* of the United States of America."

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[2] Undeniably, Hamilton wrote in *The Federalist* No. 71 (Alexander Hamilton) that he believed the power to consent to appointments included the power to consent to removals; but he changed his mind.

The same article in the succeeding section proceeds to delineate particular cases of executive power. . . .

It would *not consist with the rules of sound construction, to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause*, further than as may be coupled with the express restrictions or limitations, as in regard to the co-operation of the Senate in the appointment of officers and the making of treaties, which are *plainly qualifications of the general executive powers*. . . . The *difficulty of a complete enumeration of all the cases of executive authority would naturally dictate the use of general terms*, and would render it improbable that a specification of certain particulars were assigned as a substitute for those terms, when antecedently used. . . .

The enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power, leaving the rest to flow from the general grant of that power. . . .

The general doctrine of our Constitution is that the executive power of the nation is vested in the President, subject only to the exceptions and qualifications, which are expressed in the instrument. Two of those have already been noticed, the participation of the Senate in the appointment of officers, and in the making of treaties. A third

> remains to be mentioned: the right of the Legislature to declare war and grant letters of marquee and reprisal. *With these exceptions, the executive power of the United States is completely lodged in the President.*

Id. at 137-39 (quoting 7 *The Works of Alexander Hamilton*, 80-81 (John C. Hamilton ed., 1851)) (emphasis added).

Furthermore, James Madison argued directly for Presidential control of *all* executive officers, including power of removal at will, as essential to placing responsibility in one person, who is in turn responsible to the people:

> If the President should possess alone the power of removal from office those who are employed in the execution of the law will be in their proper situation, the chain of dependence being preserved; the *lowest officers, the middle grade, and the highest will depend, as they ought, on the President, and the President on the community.*

Myers, 272 U.S. at 132 (quoting 1 *Annals of Cong.* 499 (1789)) (emphasis added).

Chief Justice Taft found that the Constitution required that "the branches should be kept separate in all cases in which they were not expressly blended" and that "the Constitution should be expounded to blend no more than it affirmatively requires." *Myers*, 272 U.S. at 116. He also held that "[t]he vesting of the executive power in the President was essentially a

grant of the power to execute the laws." *Id.* at 117. Therefore, he concluded, Section 1 of Article II is a general grant of the executive power and Section 2 merely provides some narrow limitations on that power:

> The *executive power was given in general terms, strengthened by specific terms* where emphasis was regarded as appropriate *and was limited by direct expressions where limitation was needed*, and the fact that *no express limit was placed on the power or removal* by the executive was convincing indication that none was intended.

Myers, 272 U.S. at 118 (emphasis added).

Chief Justice Taft concluded that Article II, § 2, provides the President with the power to appoint and remove executive officers:

> Our conclusion on the merits . . . is that *article 2 grants* to the President the executive power of the government, i.e., *the general administrative control of those executing the laws, including the power of appointment and removal* of executive officers. . . .
>
> * * *
>
> [T]he provisions of the second section or article 2, which blend action by the legislative branch or by part of it, in the work of the executive, are limitations *to be strictly*

> *construed, and not to be extended by implication.*

Id. at 163 (emphasis added). Thus, Taft held that the President's executive power is plenary.

B. Cases Inconsistent With The Conclusions Set Forth Above, The Plain Language Of The Constitution, And The Intent Of The Founders Should Be Overruled.

1. *United States v. Perkins* should be overruled.

Surprisingly, given its constitutional holding, *Myers* recognized that *United States v. Perkins*, 116 U.S. 483 (1886), held that Congress could condition the terms under which the President could dismiss inferior officers. It could do so if the officers were appointed without Senate consent, pursuant to the Congress's delegation of appointment to the President or department heads, under Article II, § 2. *Id.* at 127, 161-63. *Myers* should have overruled *Perkins* because it is inconsistent with the plain language of the Constitution, the political precepts upon which the Constitution is based, and the principal holding of *Myers*.

Perkins dealt with the removal by the President, through the Secretary of the Navy, of a naval cadet, contrary to a law passed by Congress. The United States argued that the law unconstitutionally infringed upon the power of the President to remove

an inferior executive officer. The Court disagreed in a one-paragraph discussion, without examination of the plain language of the Constitution, the political precepts on which the Constitution is based, legislative history, or other cases. That Court simply proclaimed by judicial fiat:

> We have no doubt that when congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The *constitutional authority in congress to thus vest the appointment implies authority to limit*, restrict, and regulate the *removal* by such laws as congress may enact in relation to the offers so appointed.

Perkins, 116 U.S. at 485 (emphasis added). *Myers*, to the contrary, specifically and correctly held that the blended powers of Congress, set out in Section 2 of Article II, must "*be strictly construed, and not to be extended by implication.*" *Myers*, 272 U.S. at 163. *Perkins* is contrary to the plain language of the Constitution, the political theory set out in *The Federalist*, the express writings of James Madison and Alexander Hamilton, and the "Legislative Decision of 1789," all approved by *Myers*. Indeed, it is contrary to *Meyer's* constitutional holdings set out above.

Nor is *Perkins* consistent with the constitutional requirement that the power of Congress be strictly construed, to check its propensity to appropriate all

power to itself. No provision in the Constitution provides Congress with any control over removal of any executive officer. The power to consent to appointments, or to designate what officers may make appointments, is irrelevant to the power of removal, a purely executory function.

Every time Congress provides any limitation on the removal of any officer performing any executive function, whether removal only for cause or a term of office, it draws executive power and prerogative into its "impetuous vortex." *The Federalist* No. 48 at 343 (James Madison) (Benjamin Fletcher Wright ed., 1961). Under the *Perkins* reasoning, all Congress need do to absorb the President's executive power is give up its right to consent to appointments and vest the appointment power in the President alone or in department heads. Surely, Congress may not so easily avoid the dictates of the Constitution, especially given the skepticism with which the Founders viewed legislative power.

The only reasonable explanation why the *Myers* Court did not overrule *Perkins* is because the issue presented in *Perkins* was not before the *Myers* Court, though it did expound on it at some length as precedent. It is now time, however, for this Court to reconsider its decision in *Perkins*, as well as the other decisions challenged here and recognize that this Court has for many years departed from the Constitution's plain language and the intent of the Founders regarding independent agencies.

2. *Humphrey's Executor v. United States* should be overruled.

Humphrey's Executor v. United States, 295 U.S. 602 (1935), is another prime example of this Court ignoring constitutional text and permitting the legislature to "draw all power into its impetuous vortex." Indeed, it is the inevitable outgrowth of *Perkins*. In *Humphrey's Executor*, the Court found, for the first time, that so-called "independent agencies" were constitutional, and the decision is the fountainhead of the judicially sanctioned expansion of those agencies since then.

Congress had created the Federal Trade Commission and empowered it to prevent persons from using unfair methods of competition in commerce. The Commission had the power to make rules (subject to the sufficient delegation from Congress), investigate and prosecute violations, and adjudicate the violations prosecuted (subject to due process standards of fairness and review by Article III courts). *Humphreys' Executor*, 295 U.S. at 620-21.

The Commission consisted of five members appointed for specified terms by the President with the advice and consent of the Senate. *Id.* at 620. The President could remove these members only for "inefficiency, neglect of duty, or malfeasance of Office." *Id.* President Roosevelt removed, without cause and during his specified term, one of the commissioners appointed by President Hoover. Thus, the issue before the Court was whether Congress

acted unconstitutionally in encroaching on the executive power of the President by limiting the removal powers of the President.

The *Humphrey's Executor* Court, without any constitutional analysis, found Congress's action constitutional. It ignored the plain language of the Constitution and the intent of the Founders, as well as the carefully reasoned constitutional analysis of *Myers*. It "gutt[ed], in six quick pages, devoid of textual or historical precedent for the novel principal set forth, a carefully researched and reasoned 70-page opinion[, *Meyers*]." *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting). In fact, *Humphrey's Executor* was "considered by many . . . the product of an activist, anti-New Deal court bent on reducing the power of President Franklin Roosevelt." *Id.* at 724.

In *Humphrey's Executor* the Court found that Congress's purpose in creating the FTC was to render it "*independent of any department of the government.*" *Humphrey's Executor*, 295 U.S. at 625 (emphasis added). In fact, Congress intended that the Commission be answerable only to the people of the United States:

> [T]he commission was *not to be "subject to anybody in the government but * * * only to the people of the United States" free from "political* domination or *control*" or the "probability or possibility of such a thing" to be "separate and apart from any existing

> department of the government – *not subject to the orders of the President.*"

Id. (emphasis added).

Humphrey's Executor held Congress's constitutionally bizarre creation constitutional by the simple expedient of declaiming that it was not part of any other branch of government, or part of more than two branches, but controlled by neither. The Court found that "the Federal Trade Commission is an *administrative body* created by Congress to *carry into effect* legislative policies embodied in the statute." *Id.* at 627 (emphasis added). Though this description appears to be the very definition of executive power, the Court nevertheless held that "such a body cannot in any proper sense be characterized as an arm or an eye of the executive." *Id.* Instead, The Court found that the FTC was a "quasi-legislative" and "quasi-judicial" body. *Id.* at 628. The Court then merely declared, without any legal analysis or reference to constitutional text or history:

> The authority *of Congress, in creating quasi-legislative or quasi-judicial agencies*, to require them to act in discharge of their duties *independently of executive control cannot be well doubted.*

Id. at 629.

Astonishingly, *Humphrey's Executor* did not even pause to examine how a congressional purpose to create a body "subject only to the people of the United States," beyond the control of the constitutionally

defined branches of government, could itself be sustained under the Constitution. Remarkably, the opinion then determined that the FTC exists as part of the legislative and judicial branches, though subject to neither, ignoring its "purely" executive functions such as investigation and prosecution.

Nor did the Court explain how its proclamation is consistent with the Court's own holding that there is a "fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others." *Humphrey's Executor*, 295 U.S. at 629. Nor could it have, for the Constitution creates only three forms of federal authority – legislative, executive and judicial – and sets out in some detail who shall exercise each. The Constitution says nothing about independent agencies. Indeed, the Court failed to explain even the constitutional basis for the existence of these "quasi" powers, which led Justice Jackson to complain two decades later:

> The mere retreat to the qualifying "quasi" is implicit with confession that all recognized classifications have broken down, and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.

Federal Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting).

Humphrey's Executor simply took the permissibility of independence for granted, ignoring the

constitutional requirement for political accountability as a fundamental element of the Constitution's structure. The sum of the constitutional reasoning of *Humphrey's Executor* is the bald proclamation that Congress's authority "cannot well be doubted." *Humphrey's Executor*, 295 U.S. at 629. Unaccountably, the cases since the 1930's have not discussed the constitutional basis for independent agencies or "quasi" powers:

> The embarrassing truth is that in the long line of cases since the 1930's, discussing the various facts of administrative government, not one makes a serious effort to justify the independent agencies in constitutional terms. There is talk of necessity, talk of chilling and talk of coercion – in short, talk of policy – but there is nothing about constitutional structure, or the vision of the Founders.

Stephen L. Carter, *The Independent Counsel Mess*, 102 Harv. L. Rev. 105, 131 (1988). Thus, under the current scheme, whenever Congress decides independence is necessary, irrespective of whether it is permitted constitutionally, it may insulate that agency from presidential control.

Finally, *Humphrey's Executor* legitimizes placing power in the hands of a group of men responsible to no one, contrary to Hamilton's exhortation that the great danger to political responsibility is when all power is not concentrated in one person, but in a

group of men, such as is the case with the FTC and with the PCAOB here:

> When power . . . is placed in the hands of so small a number of men as to admit of their views being easily combined in a common enterprise . . . it *becomes more liable to abuse, and more dangerous when abused, that if it be lodged in the hands of one man; who from the very circumstances of this being alone, will be more narrowly watched and more readily suspected*. . . .

The Federalist No. 71 at 457 (Alexander Hamilton) (Benjamin Fletcher Wright, ed., 1961).

Humphrey's Executor is the linchpin for the validity of independent agencies, including the independent counsel upheld in *Morrison v. Olson,* 487 U.S. 654 (1988), on which the District of Columbia Circuit principally relied in validating the PCAOB. The entire structure of such agencies, including the PCAOB, is much less than a house of cards; it is more akin to a house of air, without any foundation at all.

3. *Morrison v. Olson* should be overruled.

The inevitable outgrowth of *Humphrey's Executor* is *Morrison v. Olson, supra.* At issue there was the constitutional validity of the congressional creation of an independent counsel to investigate the executive branch and the President under the Ethics in Government Act. *Morrison*, like *Humphrey's Executor*,

did not engage in an examination of constitutional text or political theory to justify its decision upholding the legitimacy of the independent counsel. Like *Humphrey's Executor*, it also simply assumed, without discussion, that Congress may create independent agencies with "quasi" powers, independent of the President, whenever Congress deems it expedient. Predictably, *Morrison* relies principally on *Humphrey's Executor* and *Perkins*, *supra*. *Morrison*, 487 U.S. at 686-87, 690 n. 29. Under this reasoning, independent agencies are constitutional not because there is any basis in the text of the Constitution, but "because [a majority of the Supreme Court] say it is so." *Morrison*, 487 U.S. at 711 (Scalia, J., dissenting).

It is also clear from a reading of the entirety of the text of this case and *Humphrey's Executor* that the Court assumes, without any constitutional analysis, that Article II, § 1, is identical to Article I, § 1. *Morrison* effectively treats *Myers* as a historical relic of only academic interest, not precedent. Indeed, the Court specifically rejects Justice Scalia's view to the contrary. *Id.* at 690 n. 29 (relying on the much earlier case of *Perkins* for that proposition). Therefore, the Court views Sections 2 and 3 of Article II as the sole grants of power to the executive, rather than as a limitation on Section 1. And it does so without any constitutional analysis, but merely by proclamation.

The *Morrison* Court had a problem, though. The independent officer in question was a prosecutor wielding undeniably pure executory powers, as all

sides admitted. Indeed, in discussing *Humphrey's Executor*, the Court admitted that "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive' at least to some degree," recognizing that the entire basis for that decision was improper. *Id.* at 690 n. 28. Accordingly, the Court was forced to "reinterpret" the holding of *Humphrey's Executor*.

True to form, it did so without any analysis whatsoever, which analysis would have undermined its decision. Thus, "*Humphrey's Executor* [like *Myers*] is swept into the dustbin of repudiated constitutional principles." *Id.* at 725 (Scalia, J., dissenting). The Court then announced that *Humphrey's Executor* "really" stood for the proposition that the permissibility of independence tolerated by the Constitution rests on the *degree of intrusion into presidential authority by Congress*." That is, *Morrison* "replaced the clear constitutional prescription that the executive power belongs to the President alone with a 'balancing test.'" *Id.* at 711 (Scalia, J., dissenting).

Consequently, courts must now inquire into whether the authority that such an officer exercises is "not essential" to "the President's proper execution of his Article II powers." *Id.* at 691. Or they may inquire into whether the imposition on the President's power "unduly trammels on executive authority." *Id.* Likewise, courts may now inquire whether the President's need to control is "so central to the function of the executive branch as to require . . . that the [officer] be

terminable at will." *Id.* The Court also engaged in such additional amorphous balancing tests as "impermissibly burdens the President's power," *id.* at 692, "completely stripped [executive power] from the President,"[3] *id.*, "sufficiently deprives the President [of executive power]," *id.*, or "impermissibly undermines the powers of the Executive Branch," *id.* at 695.

Worse, the Court "does not even attempt to craft a *substitute* criterion – a judiciable standard. . . ." *Id.* at 711 (Scalia, J., dissenting) (emphasis in original). Indeed, divorced from the text of the Constitution, or the political theory on which the Founders based it, and without any reliable guidelines, *Morrison* provides no decisional rule at all. Thus, the principal of restraint on Congress required by separation of powers becomes no more than Congress's own uncontrolled discretion. *Morrison* is, therefore, "an open invitation for Congress to experiment." *Id.* at 726 (Scalia, J., dissenting). *Morrison* provided Congress with a Pandora's box of congressional authority, which Congress pried open with its appointment of the PCAOB, and this Court must not allow that.

This Court should overrule *Morrison* and return to the plain text of the Constitution and to the intent and political theories of the Founders. It should hold

---

[3] This appears not to be even balancing. Rather, there is no imposition on presidential authority unless the Congress usurps all the President's authority.

that Congress's creation of the PCAOB unconstitutionally infringes on the executive power of the President, in violation of the Separation of Powers Doctrine, as does the SEC that appoints its members, another independent agency possessing no constitutional basis.

CONCLUSION

The plain language of the Constitution of the United States vests *all* executive power in the President of the United States as a plenary power. U.S. Const. art. II, § 1, cl. 1. Unlike Congress, the President does not have limited, enumerated powers "granted herein." Rather, the President possesses all executive power vested in Section 1, including the power to remove any executive officer or employee, except as limited in Section 2.

Section 2 of Article II is a limitation on the broad executive powers granted by Section 1, not a grant of power. Section 2 limits presidential power by providing a limited blending of Congress's power with that of the President by allowing the Senate to consent to treaties and certain appointments and permits Congress to vest appointment power without Senate consent in certain inferior executive officers in the President, Courts, or Department Heads. Those blended powers should be strictly construed and not extended by implication.

Nowhere in the Constitution is Congress, a body of enumerated powers only, vested with any power to condition the removal of persons performing, executing, implementing, or carrying out Congress's legislation. Nor can that power be implied from Congress's ability to designate certain persons to appoint inferior executive officers.

The constitutional text provides this formula in order to protect the liberty of the people by placing federal power in three departments of government – the legislative, the executive, and the judicial – independent of one another and co-equal. There are no others and all officers and employees of the government must, of necessity, be in one of these three branches. These branches are not entirely separate but are blended in very limited ways, as Section 2 of Article II demonstrates. The purpose of this blending is to allow those branches to check, balance, and moderate the others to prevent the concentration of too much power in any of those branches of government, particularly the legislative, which is the very definition of tyranny.

Because the legislative is the strongest and most ambitious of the branches of government, it requires more checks and balances, whereas the executive and the judicial branches require more protection. No blended power with the President should be implied, but, rather, it should be strictly construed. All efforts should be made not to allow the legislative branch to draw additional powers to itself or to limit in any way

the power of the executive, except as specifically provided by the Constitution.

The Constitution, the intent of the Founders, and the political theory on which they relied all require that the President be responsible for all persons executing or administering the laws and be responsible to the people for their performance. Thus, the Constitution requires political responsibility in carrying out or administering the laws of the United States. Independence of one or a group of persons who carry out the laws of the United States is anathema to the structure of the Constitution. Indeed, placing power in the hands of these few, independent of control and supervision by the President, is the very danger the Founders sought to avoid.

Therefore, there is no constitutional basis for "independent agencies" or for "quasi" powers. Nor may any employee or officer of the United States be independent of the three branches of government. Indeed, all officers and employees who execute, carry out, administer or implement the laws of the United States are subject to the control and supervision, without congressional limitation, of the President.

Thus, the PCAOB, at issue here, is an unconstitutional body without constitutionally adequate control and supervision and without real responsibility to anyone who may be answerable for its conduct. Such unbridled power is exactly what the Founders sought to limit. The PCAOB, like all independent agencies, wreaks havoc with the

Separation of Powers Doctrine, and this Court should so declare.

Respectfully submitted,

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v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has regularly appeared before this Court and other federal courts (including the appeals court and district court in this case) to express its view that separation-of-powers principles embedded in the U.S. Constitution bar any branch of the federal government from exercising powers rightfully belonging to another branch. *See, e.g., Exxon Mobil Corp. v. FERC*, No. 08-212, *cert. denied*, 2009 U.S. LEXIS 220 (Jan. 12, 2009); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

WLF has also appeared in numerous federal and State court proceedings to express its views regarding the proper scope of the federal securities laws. *See, e.g., Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, __ U.S. __, 128 S. Ct. 761 (2008); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 366 (2005). WLF has supported recommendations

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, amicus states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for amicus provided counsel for all parties with notice of intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the Court.

to relieve smaller public companies from the regulatory burdens of § 404 of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 ("Sarbanes-Oxley") because the prohibitive costs of compliance place smaller companies at a competitive disadvantage.

REASONS FOR GRANTING THE PETITION

WLF agrees with Petitioners that this is a case of great importance because it presents issues that "go to the heart of the relationship between the Legislative and Executive Branches" and because the opinion of the panel majority, authorizing a "wholly unprecedented model for federal agencies," green-lights Congress to "enact a sea change in the structure of the federal government." Pet. at 7. WLF further agrees that Congress's design of the Public Company Accounting Oversight Board ("PCAOB") – whose members are appointed by the five commissioners of the Securities Exchange Commission ("SEC") and are removable only for cause by those commissioners – suffers from "fundamental constitutional flaws" that do not square with judicial and historical precedent. Pet. at 9.

WLF writes separately to highlight a few particular issues that warrant this Court's review. First, the limits on the Executive's ability to remove PCAOB members are inconsistent with over two centuries of historical precedent. Second, assuming that members of the PCAOB are "inferior officers," their appointments by the commissioners of the SEC conform with the Appointments Clause only if the SEC is a "Department" and its commissioners are the "Head" of that department (as the court below concluded). This Court

has never determined whether a multi-member body can constitute the head of a department. Moreover, the decision below conflicts with this Court's reasoning in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), under which the President must retain ultimate responsibility and political accountability for his appointees. These removal and appointment power issues strike at the heart of our constitutional system of the separation of powers. Indeed, the dissenting opinion below emphasized that this is "the most important separation-of-powers case regarding the President's appointment and removal powers to reach the courts in the last 20 years." Pet. App. 41a. The case is of great practical importance as well because the Constitution's structural principles were designed to safeguard individual liberty. Accordingly, the Court should grant certiorari.

I. THE PRESENT RESTRICTIONS ON THE EXECUTIVE'S REMOVAL POWER ARE INCONSISTENT WITH TWO CENTURIES OF HISTORICAL PRECEDENT

For more than two centuries, the Executive Branch has consistently asserted that the Framers deliberately (and wisely) decided not to place any check on the President's exercise of the removal power. And this history demonstrates that the courts should not endorse congressional intrusions on the Executive's removal power.

This historical analysis is highly relevant because this Court has instructed that the judiciary's constitutional analysis ought to be informed by the

interpretation of constitutional law regularly adhered to by a coordinate branch of the government. Indeed, this Court has employed such an approach as part of its interpretive methodology. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919 (1983) (striking down the legislative veto because, *inter alia*, eleven Presidents who had been presented with the issue went on record challenging its constitutionality); *Myers v. United States*, 272 U.S. 52, 148, 150 (1926) (holding that Congress could not limit the removal power because, *inter alia*, the Executive Branch viewed the power as "unrestricted").

A. For Over Two Centuries, the Executive Branch Has Interpreted the Removal Power Broadly and Resisted Congressional Efforts to Limit the Removal Power

Any historical account of the removal power must begin with the "Decision of 1789." In 1789, the First Congress debated whether to adopt legislation that included a provision expressly authorizing the President to remove certain executive officials. *See, e.g.*, 1 Annals of Cong. 499 (Joseph Gales ed., 1789). After exhaustive debate, both houses of Congress passed – and President Washington signed – a version of the bill that did not include the phrase "removable by the President." James Madison and other members of the House opposed the language because its inclusion would have suggested – contrary to the text of the Constitution – that the President's removal power: (1) could be exercised only pursuant to an express legislative grant; and (2) could be conditioned by Congress. *See, e.g.*, *Parsons v. United States*, 167 U.S. 324, 328-29 (1897);

Myers, 272 U.S. at 112-116; *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986).

The Decision of 1789 thus established that the removal "power was vested in the president alone." *Parsons*, 167 U.S. at 331. As this Court has explained, the "Decision of 1789 provides contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument." *Bowsher*, 478 U.S. at 723-724 (quotation marks omitted).

Later presidential administrations have emphasized the significance of the Decision of 1789. President Taft observed that "[i]t was settled, as long ago as the first Congress, . . . that even where the advice and consent of the Senate was necessary to the appointment of an officer, the President had the absolute power to remove him without consulting the Senate. This was on the principle that the power of removal was incident to the Executive power and must be untrammeled." William H. Taft, *Our Chief Magistrate and His Powers* 56 (1916). President Tyler's administration held the same view: "It is according to [the settled construction of 1789], from the very nature of executive power, absolute in the President, subject only to his responsibility to the country (his constituent) for a breach of such a vast and solemn trust." 4 Op. Att'y Gen. 1, 1-2 (1842).

Ever since the Decision of 1789, the Executive Branch has staunchly defended the removal power against congressional encroachments. James Madison, for example, authoritatively stated that the

Constitution's text prohibits the Senate from conditioning the President's removal power:

> If the constitution has invested all executive power in the President, I venture to assert that the Legislature has no right to diminish or modify his executive authority.
>
> The question now resolves itself into this, Is the power of displacing, an executive power? *I conceive that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws.*

1 Annals of Cong. 481-82 (emphasis added).

President Jackson repeatedly clashed with Congress over proposed restrictions on his removal power. Members of Congress introduced at least four separate measures in the 1830s aimed at limiting his removal power. In a communication to the Senate defending his unconditional power of removal, President Jackson made plain that because the Executive Vesting Clause and the Take Care Clause made him "responsible for the entire action of the executive department, it was but reasonable that the power of appointing, overseeing, and controlling those who execute the laws—a power in its nature executive—should remain in his hands." Andrew Jackson, Message to the Senate Protesti ng Censure Resolution (Apr. 15, 1834), *available at* www.presidency.ucsb.edu/ws/index.php?pid=67039&st=st1=. As President Jackson explained, the "whole executive power being vested in the President, who is responsible for its exercise, it is a necessary consequence

that he should have a right to employ agents of his own choice to aid him in the performance of his duties, *and to discharge them when he is no longer willing to be responsible for their acts.*" *Id.* (emphasis added). Therefore, "[i]n strict accordance with this principle, the power of removal, . . . [an] executive power, *is left unchecked by the Constitution in relation to all executive officers.*" *Id.* (emphasis added). Significantly, Congress ultimately rejected all of these attempts to limit President Jackson's removal power. *See* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During The First Half-Century*, 47 Case Western Reserve Law Review 1451, 1534 (1997).

President Cleveland continued this defense of the removal power by removing United States Attorney Parsons, an inferior officer,[2] from his office even though a federal statute provided that his appointment was "for four years." *Parsons*, 167 U.S. at 327-38. Cleveland's administration defended the President's removal power all the way to this Court, which flatly rejected Parson's argument that the federal act could limit the President's removal power. The Court observed that, beginning with the Decision of 1789, the Executive Branch strongly defended the unrestricted nature of the removal power in a number of significant cases and that Congress had eventually acquiesced in the view that the Legislature could not impose any conditions on the President's removal power. *See id.* 328-334.

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[2] *See* United States Attorneys – Suggested Appointment Power of the Attorney General, 2 Op. Off. Legal Counsel 58, 59 (Feb. 28, 1978 ("U.S. Attorneys can be considered to be inferior officers").

President McKinley also firmly defended the removal power against congressional encroachment. The Customs Administration Act provided that the President could remove certain civil officers "for inefficiency, neglect of duty, or malfeasance in office[.]" *Shurtleff v. United States*, 189 U.S. 311, 313 (1903). When the President removed one of these inferior officers (Shurtleff) without providing a reason for his action, Shurtleff filed suit. *See id.* at 315-16. This Court agreed with President McKinley and rejected the "for cause" removal language because a contrary result "would involve the alteration of the universal practice of the government for over a century." *Id.* at 316.

President Coolidge's administration ranks as one of the most ardent defenders of the removal power, most notably due to its position in *Myers v. United States*. There, this Court addressed "whether under the Constitution the President has the exclusive power of removing executive officers" – a question the Court answered in the affirmative. *Myers*, 272 U.S. at 106. In the administration's brief to this Court, President Coolidge's Solicitor General explained the history of the President's plenary removal power, starting with the Decision of 1789 and continuing through over one hundred years of government practice. Solicitor General Beck wrote that, "[f]rom the Beginning of the Government removal has been recognized as essentially an executive function," and drew the Court's attention to the numerous Attorney General opinions defending the unilateral nature of the Executive removal power. Brief of the United States, *reproduced in Myers*, 272 U.S. at 99, 104-106.

Presidents also have opposed congressional attempts to force particular executive officers out of their positions by disqualifying them from their offices. For example, President Truman argued that allowing Congress to effectively remove officers by arbitrarily enacting new qualifications would impinge on his removal powers. *See* Statement by the President on the Interior Department Appropriation Act (June 30, 1948), *available at* www.presidency.ucsb.edu/ws/index.php?pid=12949. President Truman continued to defend the removal power until Congress finally yielded and deleted the changes in the qualifications for the posts. *See* Interior Department Appropriation Act, 63 Stat. 765, 778-79 (1949).

President Nixon likewise opposed congressional efforts to throw his executive officers out of their offices. He vetoed a bill that attempted to remove two inferior officers – the Director and Deputy Director of OMB – from their offices by abolishing their positions and at the same time recreating them as positions subject to Senate confirmation. President Nixon found the bill to be nothing more than a congressional attempt to circumvent the Executive's removal power. *See* Veto of a Bill Requiring Senate Confirmation of the Director and Deputy Director of the Office of Management and Budget (May 18, 1973), *available at* www.presidency.ucsb.edu/ws/index.php?pid=3851&st=&st1=. Congress failed to override his veto.

More recently, Presidents have stood their ground to defend congressional attacks on the removal power through agency overhauls. In particular, President Clinton opposed a congressional attempt to limit the

President's authority to remove the Administrator of the Social Security Administration. As part of legislation transforming the SSA into an independent agency, Congress made the Administrator removable only for "neglect of duty or malfeasance in office." 42 U.S.C. § 902(a)(3) (2000). While signing the bill, President Clinton stated that these limitations on his removal authority were constitutionally problematic, and he recommended "a corrective amendment." *See* Statement on Signing the Social Security Independence and Program Improvements Act of 1994 (Aug. 15, 1994), *available at* www.presidency.ucsb.edu/ws/index.php?pid=48981.

Likewise, President George W. Bush strongly asserted his removal authority during creation of the Department of Homeland Security. President Bush insisted upon having unfettered power to dismiss lower-level department employees and ultimately defeated Congress on the issue. *See* Christopher S. Yoo, Steven G. Calabresi, and Anthony J. Colangelo, *The Unitary Executive in the Modern Era*, 1945-2004, 90 Iowa L. Rev. 601, 727 (2005).

B. History Demonstrates That The Courts Should Not Endorse Congressional Intrusions Upon The Executive's Removal Power

As shown above, our nation's Presidents have uniformly rebuffed congressional efforts to interfere with the Executive removal power. The debates surrounding two congressional acts in particular – the Tenure In Office Act and the Ethics In Government Act

– deserve special consideration because in both cases Congress eventually accepted the Presidents' view of the removal power and conceded that interfering with the Executive's Article II removal power was not in our nation's interest.

The Tenure In Office Act. In 1867, Congress passed the Tenure In Office Act, under which no civil officers appointed by the President with the advice and consent of the Senate could be removed from office unless the Senate confirmed a successor. After Congress passed this legislation, however, President Andrew Johnson mounted one of the most vigorous defenses of the removal power in history. President Johnson determined that the text of the Constitution and the unbroken practices of both Congress and the Executive Branch prohibited Congress from interfering with the removal power in the manner attempted. *See* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During The Second Half-Century*, 26 Harv. J.L. & Pub. Pol'y 667, 748 (2003). Accordingly, President Johnson vetoed the legislation.

In a message accompanying his veto, President Johnson made his position clear: "That the power of removal is constitutionally vested in the President of the United States is a principle which has been not more distinctly declared by judicial authority and judicial commentators than it has been uniformly practiced upon by the legislative and executive departments of the government." Andrew Johnson, Veto Message to the Senate (Mar. 2, 1867), *available at* www.presidency.ucsb.edu/ws/index.php?pid=72071&st=&st1=. Notwithstanding President Johnson's robust defense of the

removal power, Congress overrode the President's veto and enacted the Tenure In Office Act. Remaining steadfast in his position, President Johnson removed his Secretary of War without complying with the Tenure In Office Act. In response, Congress voted to impeach the President of the United States for the first time in our nation's history. However, the Senate voted not to remove President Johnson from office, implicitly acknowledging that he was not wrong to disregard what Congress later conceded was an unconstitutional statute.

After President Johnson left office, Presidents Grant and Cleveland maintained Johnson's defense of the removal power. *See* Ulysses S. Grant, First Annual Message (Dec. 6, 1869), *available at* www.presidency.ucsb.edu/ws/index.php?pid=29510&st=&st1=. Congress acceded to President Grant's view and partially repealed the Tenure In Office Act. *See* Act of Apr. 5, 1869, ch. 10, § 2, 16 Stat. 6, 7. President Cleveland declared that "the power to remove or suspend such officials is vested in the president alone by the Constitution." Grover Cleveland, Special Message to the Senate (Mar. 1, 1886), *available at* www.presidency.ucsb.edu/ws/index.php?pid=71867&st=&st1=. Public opinion eventually turned against the Tenure in Office Act and Congress repealed the Act in its entirety. *See* Act of Mar. 3, 1887, ch. 353, 24 Stat. 500.

The Ethics In Government Act. The Ethics In Government Act charted much the same course as the Tenure In Office Act. The Carter administration opposed the creation of a judicially appointed

independent counsel[3] designed to ferret out misconduct at the highest levels of the Executive Branch, but it lacked the political power to defeat passage of the Act. President Reagan's subsequent administration, however, launched a vigorous attack on the Act. Executive Branch officials repeatedly challenged the constitutionality of the Act in hearings before Congress, and President Reagan himself challenged the Act's limits on his removal power. *See* Statement on Signing the Independent Counsel Reauthorization Act of 1987 (Dec. 15, 1987), *available at* www.presidency.ucsb.edu/ws/index.php?pid=33827&st=&st1=.

The Reagan administration ultimately launched a full-scale attack on the Act, challenging its constitutionality in court in connection with the Independent Counsel's investigation of then-Assistant Attorney General Theodore Olson. Although the Reagan administration's judicial challenge ultimately was unsuccessful in this Court, *see Morrison v. Olson*, 487 U.S. 654 (1988),[4] President Reagan's Solicitor General vigorously defended his removal power: "Whatever limits Congress may constitutionally impose on the President's various means of holding other officers to

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[3] The independent counsel provisions of the Act were reenacted by the Ethics in Government Act Amendments of 1982, Pub. L. 97-409, 96 Stat. 2039, the Independent Counsel Reauthorization Act of 1987, Pub. L. 100-191, 101 Stat. 1293, and the Independent Counsel Reauthorization Act of 1994, Pub. L. 103-270, 108 Stat. 732. It has been referred to popularly as the Independent Counsel Act.

[4] Notably, the removal provisions at issue in *Morrison* did not impinge on the Executive's removal power nearly as much as the "double for-cause" limitations, Pet. App. 26a, at issue here. *See* Pet. at 18-23.

account, it may not deny his power to remove purely executive officers like an independent counsel." Brief for the United States as Amicus Curiae Supporting Appellees at 29, *Morrison v. Olson*, 487 U.S. 654 (1988) (No. 87-1279).

President George H.W. Bush and Attorney General William Barr reiterated the Executive Branch's view that the Act was unconstitutional, and President Bush repeatedly threatened to veto any attempt to extend the Act past its scheduled sunset in 1992.

Then, during President Clinton's administration, the Ethics In Government Act engendered a constitutional crisis that resulted in the death of the Act. Attorney General Janet Reno authorized an investigation of President Clinton by Independent Counsel Kenneth Starr, which culminated in a decision by the House to impeach the President. Like President Johnson, President Clinton ultimately was acquitted by the Senate. By then, even initial champions of the Ethics In Government Act recognized that the Act rested on an unconstitutional foundation. Some even campaigned for its demise: "In 1993, as many of you know, I testified in support of the statute .... However, after working with the Act, I have come to believe ... that the Independent Counsel Act is structurally flawed and that those flaws cannot be corrected within our constitutional framework." *Future of the Independent Counsel Act: Hearings Before the Senate Comm. On Governmental Affairs*, 106th Cong. 243, 247-48 (1999) (statement of Attorney General Janet Reno). In light of the bipartisan recognition of the Act's failures – both in

practice and as a constitutional matter – Congress allowed the Act to sunset.

Both the Tenure In Office Act and the Ethics In Government Act remain in the legislative dustbin. The demise of these statutes highlights the "adverse practical consequences" of disregarding the Constitution's structural principles. *Mistretta v. United States*, 488 US 361, 421 (1989) (Scalia, J., dissenting). Moreover, that these statutes were ultimately considered unconstitutional by some of their initial supporters demonstrates that the constitutional crises they engendered might well have been avoidable, had the text and history of Article II been properly considered at the outset. The Court should grant certiorari in this case.

II. THE APPOINTMENT OF PCAOB MEMBERS BY THE SEC IS INCONSISTENT WITH THE CONSTITUTION

Even assuming (as the panel majority found) that PCAOB members are "inferior Officers," review is warranted to determine whether their appointment by the SEC can withstand constitutional scrutiny. Although the Excepting Clause permits inferior officers to be appointed by the "Heads of Departments," it is far from clear that the SEC is a department and that the five commissioners of the SEC, collectively, are its head.

A. Independent Agencies, Like the SEC, Are Not Departments

Although the Court has never decided whether the SEC is a "Department," its jurisprudence strongly suggests that the SEC is not. As the Court explained nearly seventy-five years ago, independent agencies like the SEC simply "cannot in any proper sense be characterized as an arm or an eye of the executive." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935). Because such agencies are removed from, and thus do not share in, the President's accountability to the citizenry, they are not departments under the Appointments Clause.

In its most recent foray into this area, *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), the Court explained that accountability to the people, through the President, is the principal determinant of whether an entity is a Department within the meaning of the Appointments Clause. In *Freytag*, the Court considered whether the Tax Court – an Article I court and independent agency outside of Executive control – was a "Department" under the Appointments Clause. The Court held that the Tax Court was not a "Department," explaining that the term is limited only to "executive divisions like the Cabinet-level departments." *Id.* at 886. The Court emphasized "the Framers' determination to limit the distribution of the power of appointment" in a manner that "ensure[s] that those who wield[] it [a]re accountable to political force and the will of the people." *Id.* at 884. Acknowledging "the inexorable presence of the administrative state," *id.* at 885, the Court noted that "a holding that every

organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint." *Id.* Because such a holding would frustrate the Framers' intent to "limit the distribution of the power of appointment," *id.* at 884, appointment power must reside only with those entities whose "heads are subject to the exercise of political oversight and share the President's accountability to the people," that is, the "Cabinet-level departments." *Id.* at 886. To "[t]reat[] the Tax Court as a 'Department' . . . would defy the purpose of the Appointments Clause" and "the meaning of the Constitution's text." *Id.* at 888.

Under this reasoning, the SEC is not a "Department" under the Appointments Clause because it is an independent agency. Indeed, Justice Scalia made this precise point in his concurrence in *Freytag*, explaining that "independent regulatory agencies" are unlike cabinet departments because they "are specifically designed *not* to have the quality . . . of being 'subject to the exercise of political oversight and sharing the President's accountability to the people.'" *Freytag*, 501 U.S. at 916 (Scalia, J., concurring in the judgment) (citation omitted; emphasis in original); *see also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 398 (1995).

The panel majority, however, determined that the SEC is "Cabinet-like" because "it exercises executive authority over a major aspect of government policy, and its principal officers are appointed by the President with the advice and consent of the Senate . . . and subject to removal by the president." Pet. App. 22a. The panel majority, however, failed to consider the characteristics

of Cabinet-level departments that are relevant to the Appointments Clause under this Court's precedent: political oversight and a share in the President's accountability to the people. *Freytag*, 501 U.S. at 886. The panel majority's conclusion that the SEC is a "Department" thus contravenes both *Freytag* and the very purpose of the Appointments Clause, by allowing the appointment power to be "diffused" across entities that are, by design, immune "to political force and the will of the people," *Freytag*, 501 U.S. at 884. *See* 148 Cong. Rec. S6334 (daily ed. July 8, 2002) (statement of Sen. Gramm) ("This board is going to have *massive power, unchecked power, by design* . . . .") (emphasis added). The Court should grant certiorari to review consider whether treating the SEC as a "Department" under the Appointments Clause is consistent with the constitutional design.

B. The Five Commissioners of the SEC, Collectively, Are Not the SEC's "Head"

Even assuming that the SEC is a "Department" constitutionally authorized to wield appointment power, the SEC's appointment of inferior officers is constitutional only if the five SEC commissioners together constitute the SEC's head. To so hold would conflict with the Framers' constitutional design of the appointment power.

As a textual matter, the Framers' use of the term "head" meant to signify that the power to appoint inferior officers was to rest in an individual rather than a committee or other collective body. Indeed, the term "head" was well-known to be "[a] chief; a principal

person; a leader; a commander; one who has the first rank or place, and to whom others are subordinate[.]" Noah Webster, An American Dictionary of the English Language (New York, S. Converse 1828). Moreover, this meaning of the term "head" is consistent with the meaning of the phrase "Heads of Departments," which was understood to identify the cabinet secretaries – each an individual – who would supervise their respective departments and share in the President's accountability to the people. *See, e.g.*, *United States v. Mouat*, 124 U.S. at 307 ("the heads of the departments were defined in [*United States v. Germaine*, 99 U.S. 508 (1878)] to be what are now called the members of the cabinet"). To hold that the five-member SEC is the "Head" of the SEC thus would not square with the Constitution's text.

Similarly, to hold that the five-member SEC is the "Head" of the SEC would not square with the Framers' intent. As the Court has explained, the "Framers recognized the dangers posed by an excessively diffuse appointment power," and "rejected efforts to expand that power" beyond a single person. *Freytag*, 501 U.S. at 885. Indeed, Alexander Hamilton underscored the benefits of vesting a single individual with the appointment power, explaining that an individual would have "a livelier sense of duty" and "fewer personal attachments to gratify" and thus would not "be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body." The Federalist No. 76; *see also* 3 Joseph Story, Commentaries on the Constitution § 1522 (1833) ("[O]ne man of discernment is better fitted to analyze and estimate the peculiar qualities, adapted to

particular offices, than any body of men of equal, or even superior discernment.").

Again, this constitutional design was meant to ensure political accountability, ultimately to the people. Vesting a multi-member group or committee with appointment power would diffuse the appointment power and impede political accountability. This is precisely why the Framers specifically limited the power to appoint inferior officers to "the highly accountable President or the heads of federal departments." *Weiss*, 510 U.S. at 187 (Souter, J., concurring); *see also Freytag*, 501 U.S. at 886 (noting that the "Heads of Departments . . . share the President's accountability to the people").

To hold that the five commissioners of the SEC are its head does not comport with the constitutional design of the appointments power. Yet, the panel majority held that the commissioners are the "head" of the SEC within the meaning of the Excepting Clause. The panel relied upon *Silver v. United States Postal Service*, 951 F.2d 1033 (9th Cir. 1991), in which the Ninth Circuit held that the nine governors of the Postal Service constituted its head. The panel majority echoed the Ninth Circuit's holding that Congress vested ultimate control and authority of the postal service in its board of governors. Pet. App. 23a-24a.

This Court has not addressed whether a multi-member body may constitutionally appoint officers of the United States under the Excepting Clause. Although the text and purpose of the Appointments Clause strongly suggest that the power to appoint should vest in a single individual, instead of a group, it

is not necessary for this Court to find that Congress could never create a body with a multi-member "head."

Assuming the SEC is a "department," the structure of the SEC suggests that if there is a head of the SEC, it is the SEC's Chairman. In 1950, President Truman exercised his power to "provide for the appointment and pay of the head . . . of any agency," Reorganization Act of 1949, 5 U.S.C. § 904(2), by delegating to the Chairman of the SEC "the executive and administrative functions of the Commission, including . . . the appointment and supervision of personnel employed under the Commission." Reorganization Plan No. 10 of 1950, § 1(a), 15 Fed. Reg. 3175, 64 Stat. 1265 (May 24, 1950), reprinted in 5 U.S.C. app. Control over these executive and administrative functions strongly suggests that the Chairman is the head of the SEC. Indeed, at least one circuit court has recognized this, explaining that, by "control[ling] key personnel, internal organization and the expenditure of funds, the chairman [of the SEC] exerts far more control [over the SEC] than his one vote would seem to indicate." *SEC v. Blinder, Robinson & Co.*, 855 F.2d at 681. Moreover, the SEC itself identifies its Chairman as "the SEC's top executive." Current SEC Commissioners, http://www.sec.gov/about/commissioner.shtml (last visited Feb. 5, 2009).

In addition, treating the Chairman as the head of the SEC vindicates the constitutional design. First, it reinforces the political accountability required by the Appointments Clause, because the Chairman, unlike the SEC commissioners, serves as Chairman at the pleasure of the President. The Chairman therefore has more direct political accountability to the President than the

other SEC commissioners or the five of them as a group. Second (and perhaps more importantly), if the Chairman is not the "head" of the SEC, then his appointment of numerous SEC officials – such as the Directors of the SEC's four main divisions and the agency's General Counsel – is constitutionally questionable. Each of these individuals appears to be an inferior officer because each performs functions vital to the SEC's mandate. See, e.g., 17 C.F.R. §§ 200.18, .19a-b, .20b, .21. And each was appointed by the Chairman alone. *See* Reorganization Plan No. 10 of 1950, § 1(a). If the Chairman is not the "head" of the SEC, then these officers were not appointed by the "Head of a Department" in accordance with the Excepting Clause – thus casting doubt on the legitimacy of their enforcement actions. The Court should grant review to consider these difficult questions concerning the distribution of the appointment power.

III. THE STRUCTURAL PROTECTIONS AT ISSUE ARE DESIGNED TO SAFEGUARD INDIVIDUAL LIBERTY

Congress's attempt to isolate the PCAOB from accountability to the President encroaches upon the powers to appoint, control, and remove federal officers that the Constitution vests in the Executive. In so doing, it implicates structural principles that protect the liberty of the people. *See Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) (explaining that the Constitution structural principles "protect the liberty and security of the governed"). As Justice Kennedy has explained, this Court must vindicate these

principles, "even when . . . no immediate threat to liberty is apparent. When structure fails, liberty is always in peril." *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J. concurring).

Accordingly, in order to protect individual liberty, the Court will invalidate actions by government officers if those officers are not appointed in conformance with the clause. For example, the propriety of the Tax Court's appointment of a Special Trial Judge in *Freytag* went to the "validity of the Tax Court proceeding" that was the basis for suit. 501 U.S. at 880. Similarly, criminal convictions can be reversed if the officers adjudicating the prosecution are not appointed in compliance with the clause. Indeed, in *Ryder v. United States*, 515 U.S. 177 (1995), this Court held that a serviceman court-martialed and sentenced to five years' imprisonment for drug offenses had the right to challenge his conviction on the basis of a constitutionally improper appointment to the military judges' panel.

Improper appointment and lack of Presidential control over the PCAOB is especially problematic because its powers reach to the core of individual liberty. The PCAOB has broad powers to define criminal acts, *see* 15 U.S.C. §§ 78u, 7202(b), and to enforce violations of its rules, 15 U.S.C. § 7215(c)(4). Penalties for violating PCAOB rules include criminal sanctions of up to 20 years imprisonment and fines of up to $15 million. 15 U.S.C. §§ 78ff(a), 7215(c)(4)(D).

Moreover, the Board's powers reach broadly throughout the nation. They fall upon the nation's public companies and accountants and, through them, the entire population, which depends on them for jobs, investment, and the goods and services that keep the nation going. The PCAOB's decisions affect "all accountants and everybody everyone they work for, which directly or indirectly is every breathing person in the country." 148 Cong. Rec. at S6334.[5] Because the Board's reach is so broad, and its powers run so deep, it is of vital iinportance that its members be appointed in conformity with the Constitution. The people of our nation are entitled, under the Constitution's structural protections, to hold accountable officers exercising significant power over the lives of individual citizens and companies and over the whole of the nation's economy.

Importantly, because these questions of Executive appointment and removal power implicate the individual liberty of the people, the Executive Branch's support of the mechanisms for the appointment and removal of PCAOB members cannot save them. As

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[5] Unchecked by political will, the PCAOB has run amuk among the accounting industry and our nation's public companies. *See* Bob Merritt, *The Sarbanes-Oxley Act: A Personal View*, Washington Legal Foundation Legal Opinion Letter, Vol. 15, No. 21 (Oct. 21, 2005) ("This under-supervised and overzealous group of bean counters [the PCAOB] has generated countless regulations and has taken a gun-and-badge attitude toward public company managements, their financial executives, and their auditors."). Notably, the burdens of Sarbanes-Oxley and the PCAOB fall disproportionately on small businesses. *See* John Berlau,, June 7, 2007, *SOXing it to the Little Guy: How Sarbanes-Oxley Hurts Small Investors and Entrepreneurs*, June 7, 2007, *available at* www.cei.org/pdf/5954.pdf.

Justice Blackmun recognized in *Freytag*, "[t]he structural principles embodied in the Appointments Clause do not speak only, or even primarily, of Executive prerogatives[.]" *Freytag*, 501 U.S. at 880. Violations of the clause are therefore not within the power of the Executive to waive. "The structural interests protected by the Appointments Clause are not those of any one branch of Government, but of the entire Republic." *Id.*

CONCLUSION

For the reasons set forth herein and in the Petition, amicus curiae Washington Legal Foundation requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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JOINT APPENDIX

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IN THE

Supreme Court of the United States

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,

Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:06-cv-00217-JR

FREE ENTERPRISE FUND, ET AL., PLAINTIFFS

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, ET AL., DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
02/07/2006	1	COMPLAINT against CHARLES NIEMEIER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA J. GILLAN, DANIEL L. GOELZER (Filing fee $250) filed by FREE ENTERPRISE FUND, BECKSTEAD AND WATTS, LLP. (lc,) (Entered: 02/08/2006)
02/07/2006	2	LCvR 7.1 – CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by FREE ENTERPRISE

DATE	DOCKET NUMBER	PROCEEDINGS
		FUND, BECKSTEAD AND WATTS, LLP (lc,) (Entered: 02/08/2006)
02/07/2006		Summons (5) Issued as to CHARLES NIEMEIER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA J. GILLAN, DANIEL L. GOELZER. (lc,) (Entered: 02/08/2006)
02/08/2006	3	NOTICE of Appearance by Christian G. Vergonis on behalf of FREE ENTERPRISE FUND, BECKSTEAD AND WATTS, LLP (Vergonis, Christian) (Entered: 02/08/2006)
02/15/2006	4	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD served on 2/10/2006, answer due 3/2/2006 (Vergonis, Christian) (Entered: 02/15/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
02/15/2006	5	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. BILL GRADISON served on 2/10/2006, answer due 3/2/2006 (Vergonis, Christian) (Entered: 02/15/2006)
02/15/2006	6	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. KAYLA J. GILLAN served on 2/10/2006, answer due 3/2/2006 (Vergonis, Christian) (Entered: 02/15/2006)
02/15/2006	7	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. DANIEL L. GOELZER served on 2/10/2006, answer due 3/2/2006 (Vergonis, Christian) (Entered: 02/15/2006)
02/15/2006	8	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. CHARLES

DATE	DOCKET NUMBER	PROCEEDINGS
		NIEMEIER served on 2/10/2006, answer due 3/2/2006. (Vergonis, Christian) (Entered: 02/15/2006)
03/01/2006	9	NOTICE of Appearance by Heidi E. Murdy on behalf of all defendants (Murdy, Heidi) (Entered: 03/01/2006)
03/01/2006	10	Corporate Disclosure Statement by PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD. (Murdy, Heidi) (Entered: 03/01/2006)
03/01/2006	11	Unopposed MOTION for Extension of Time to File Answer *to Complaint* by CHARLES NIEMEIER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA J. GILLAN, DANIEL L. GOELZER. (Murdy, Heidi) (Entered: 03/01/2006)
03/02/2006		MINUTE ORDER granting unopposed motion for extension of time 11 to March 9, 2006. Signed by

DATE	DOCKET NUMBER	PROCEEDINGS
		Judge James Robertson on March 2, 2006. (MT) (Entered: 03/02/2006)
03/08/2006	12	Unopposed MOTION for Extension of Time to *Respond to Complaint* by CHARLES NIEMEIER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA J. GILLAN, DANIEL L. GOELZER. (Murdy, Heidi) (Entered: 03/08/2006)
03/09/2006		MINUTE ORDER granting defendants' motion for extension of time 12 to March 16, 2006. Signed by Judge James Robertson on March 9, 2006. (MT) (Entered: 03/09/2006)
03/15/2006	13	Consent MOTION for Extension of Time to File Answer *to Complaint* by CHARLES NIEMEIER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA J. GILLAN, DANIEL L. GOELZER. (Braga,

DATE	DOCKET NUMBER	PROCEEDINGS
		Stephen) (Entered: 03/15/2006)
03/16/2006		MINUTE ORDER granting defendants' consented motion for extension of time 13 to May 15, 2006. Signed by Judge James Robertson on March 16, 2006. (MT) (Entered: 03/16/2006)
03/21/2006	14	NOTICE of Appearance by Joe Robert Caldwell, Jr. on behalf of CHARLES NIEMEIER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA J. GILLAN, DANIEL L. GOELZER (Caldwell, Joe) (Entered: 03/21/2006)
04/05/2006	15	Joint MEET AND CONFER STATEMENT. (Caldwell, Joe) Modified on 4/6/2006 (lc,) (Entered: 04/05/2006)
04/12/2006	16	SCHEDULING ORDER: Defendants' proposed scheduling order 15 is adopted as and for the scheduling order of the court. Oral argument on defendant's motion to

DATE	DOCKET NUMBER	PROCEEDINGS
		dismiss is set for June 29, 2006 at 3:00 p.m. in Courtroom 23A before Judge James Robertson. Signed by Judge James Robertson on April 12, 2006. (MT) (Entered: 04/12/2006)
05/15/2006	17	MOTION to Dismiss for Lack of Jurisdiction by CHARLES NIEMEIER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA J. GILLAN, DANIEL L. GOELZER. (Attachments: #1 Appendix #2 Text of Proposed Order) (Caldwell, Joe) (Entered: 05/15/2006)
05/15/2006	18	MOTION to Dismiss For Failure to State a Claim by CHARLES NIEMEIER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA J. GILLAN, DANIEL L. GOELZER. (see docket entry #17 for document images) (lc,) (Entered: 05/16/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
06/02/2006	19	NOTICE of Statement of Interest by UNITED STATES OF AMERICA. (nmw,) (Entered: 06/05/2006)
06/05/2006	20	Memorandum in opposition to re 18 MOTION to Dismiss, 17 MOTION to Dismiss for Lack of Jurisdiction filed by FREE ENTERPRISE FUND, BECKSTEAD AND WATTS, LLP. (Attachments: #1 Text of Proposed Order) (Vergonis, Christian) (Entered: 06/05/2006)
06/06/2006	21	MOTION to Strike 19 Notice (Other) *Statement of Interest of the United States* by FREE ENTERPRISE FUND, BECKSTEAD AND WATTS, LLP. (Attachments: #1 Text of Proposed Order) (Vergonis, Christian) (Entered: 06/06/2006)
06/08/2006	22	Memorandum in opposition to re 21 MOTION to Strike 19 Notice (Other) *Statement*

DATE	DOCKET NUMBER	PROCEEDINGS
		of Interest of the United States filed by UNITED STATES OF AMERICA. (Katerberg, Robert) (Entered: 06/08/2006)
06/08/2006	23	Memorandum in opposition to re 21 MOTION to Strike 19 Notice (Other) *Statement of Interest of the United States* filed by CHARLES NIEMEIER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA J. GILLAN, DANIEL L. GOELZER. (Attachments: #1 Text of Proposed Order) (Caldwell, Joe) (Entered: 06/08/2006)
06/13/2006		MINUTE ORDER denying plaintiff's motion to strike government's statement of interest 21 and granting plaintiff 14 days to file any response. Signed by Judge James Robertson on June 13, 2006. (MT) (Entered: 06/13/2006)
06/19/2006	24	REPLY to opposition to motion re 17 MOTION to Dismiss for Lack of

DATE	DOCKET NUMBER	PROCEEDINGS
		Jurisdiction, 18 MOTION to Dismiss *for Failure To State a Claim* filed by CHARLES NIEMEIER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA J. GILLAN, DANIEL L. GOELZER. (Caldwell, Joe) (Entered: 06/19/2006)
06/27/2006	25	RESPONSE re 19 Notice (Other) *Statement of Interest of the United States* filed by FREE ENTERPRISE FUND, BECKSTEAD AND WATTS, LLP. (Vergonis, Christian) (Entered: 06/27/2006)
06/29/2006		Minute Entry for proceedings held before Judge James Robertson: Motion Hearing held on 6/29/2006 re 17 MOTION to Dismiss for Lack of Jurisdiction filed by DANIEL L. GOELZER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA

DATE	DOCKET NUMBER	PROCEEDINGS
		J. GILLAN, CHARLES NIEMEIER, 18 MOTION to Dismiss filed by DANIEL L. GOELZER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA J. GILLAN, CHARLES NIEMEIER. Motions taken under advisement. (Court Reporter Rebecca Stonestreet.) (alr,) (Entered: 06/30/2006)
07/06/2006	26	NOTIFICATION OF SUPPLEMENTAL AUTHORITY by CHARLES NIEMEIER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA J. GILLAN, DANIEL L. GOELZER (Caldwell, Joe) (Entered: 07/06/2006)
07/17/2006	27	NOTICE of Appearance by Jeffrey A. Lamken on behalf of CHARLES NIEMEIER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA J. GILLAN, DANIEL L.

DATE	DOCKET NUMBER	PROCEEDINGS
		GOELZER (Lamken, Jeffrey) (Entered: 07/17/2006)
07/25/2006	28	MOTION for Summary Judgment by FREE ENTERPRISE FUND, BECKSTEAD AND WATTS, LLP. (Attachments: #1 Text of Proposed Order) (Vergonis, Christian) Additional attachment(s) added on 7/26/2006 (lc,) (Entered: 07/25/2006)
07/25/2006	29	ENTERED IN ERROR..... MEMORANDUM re 28 MOTION for Summary Judgment filed by FREE ENTERPRISE FUND, BECKSTEAD AND WATTS, LLP, by FREE ENTERPRISE FUND, BECKSTEAD AND WATTS, LLP. (Vergonis, Christian) Modified on 7/26/2006 (lc,) (Entered: 07/25/2006)
07/25/2006	30	ENTERED IN ERROR.....NOTICE *of Plaintiffs' Statement of Material Facts Not in*

DATE	DOCKET NUMBER	PROCEEDINGS
		Genuine Dispute by FREE ENTERPRISE FUND, BECKSTEAD AND WATTS, LLP re 29 Memorandum, 28 MOTION for Summary Judgment (Vergonis, Christian) Modified on 7/26/2006 (lc,) (Entered: 07/25/2006)
07/26/2006		NOTICE OF CORRECTED DOCKET ENTRY: re 29 Memorandum, 30 Notice (Other) were entered in error and the documents have been added to docket entry #28. (lc,) (Entered: 07/26/2006)
07/28/2006	31	TRANSCRIPT of Motions Hearing held on June 29, 2006 before Judge James Robertson. Court Reporter: Rebecca Stonestreet. The public may view the document in the Clerk's Office between the hours of 9:00 a.m. and 4:00 p.m, Monday through Friday. (lc,) (Entered: 07/31/2006)
07/31/2006	32	Joint MOTION for Extension of Time to File Response/Reply as to 28

DATE	DOCKET NUMBER	PROCEEDINGS
		MOTION for Summary Judgment by CHARLES NIEMEIER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA J. GILLAN, DANIEL L. GOELZER. (Attachments: #1 Exhibit) (Caldwell, Joe) (Entered: 07/31/2006)
08/01/2006		VACATED pursuant to Order filed 8/25/2006..... MINUTE ORDER granting 32 Motion for Extension of Time to File Response/Reply re 32 Joint MOTION for Extension of Time to File Response/Reply as to 28 MOTION for Summary Judgment Responses due by 9/1/2006 Replies due by 9/22/2006. Signed by Judge James Robertson on 8/1/2006. (alr) Modified on 8/28/2006 (lc,) (Entered: 08/01/2006)
08/22/2006	33	MOTION for Leave to File Memorandum as Amicus Curiae in Support of Plaintiffs' Motion for Summary Judgment by

DATE	DOCKET NUMBER	PROCEEDINGS
		WASHINGTON LEGAL FOUNDATION. (Attachments: #1 Exhibit Amicus Brief #2 Text of Proposed Order) (nmw,) (Entered: 08/23/2006)
08/25/2006	34	ORDER sua sponte that the minute order entered August 1, 2006 is vacated, that the joint motion for extension of time 32 is granted, that a reply to the cross-motion will be permitted and that the deadlines proposed by the parties (including a date for the filing of a reply to the cross-motion) are approved and so ordered. Signed by Judge James Robertson on August 25, 2006. (MT) (Entered: 08/25/2006)
09/01/2006	35	Unopposed MOTION to Intervene by UNITED STATES OF AMERICA. (Attachments: #1 Text of Proposed Order #2 Proposed Intervenor United States' Motion for Summary Judgment #3 Memorandum of Proposed Intervenor

DATE	DOCKET NUMBER	PROCEEDINGS
		United States in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of United States' Cross-Motion for Summary Judgment #4 Proposed Order Granting Proposed Intervenor's Motion for Summary Judgment #5 Proposed Intervenor United States' Statement Pursuant to Local Rules 7(h) and 56.1 #6 Proposed Intervenor's Statement in Response to Plaintiffs' Statement of Undisputed Material Facts #7 Proposed Intervenor United States' Motion to Conform Briefing Schedule for its Motion for Summary Judgment) (Katerberg, Robert) (Entered: 09/01/2006)
09/01/2006	36	Memorandum in opposition to re 28 MOTION for Summary Judgment filed by CHARLES NIEMEIER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA

DATE	DOCKET NUMBER	PROCEEDINGS
		J. GILLAN, DANIEL L. GOELZER. (Attachments: #1 Affidavit #2 Text of Proposed Order) (Caldwell, Joe) (Entered: 09/01/2006)
09/01/2006	37	Cross MOTION for Summary Judgment by CHARLES NIEMEIER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA J. GILLAN, DANIEL L. GOELZER. (Attachments: #1 Affidavit #2 Text of Proposed Order) (Caldwell, Joe) (Entered: 09/01/2006)
09/01/2006	38	MOTION for Leave to Appear as Amici Curiae by AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM, COUNCIL OF

DATE	DOCKET NUMBER	PROCEEDINGS
		INSTITUTIONAL INVESTORS, LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION, PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO, SACRAMENTO COUNTY EMPLOYEES' RETIREMENT SYSTEM, TEACHERS INSURANCE AND ANNUITY ASSOCIATION-COLLEGE RETIREMENT EQUITIES FUND. (Attachments: #1 Text of Proposed Order #2 Proposed Amici Curiae brief) (lc,) (Entered: 09/06/2006)
09/07/2006		MINUTE ORDER granting movant Washington Legal Foundation's motion for leave to file 33 as amicus curiae. Signed by Judge James Robertson on September 7, 2006. (MT) (Entered: 09/07/2006)
09/07/2006		MINUTE ORDER granting

DATE	DOCKET NUMBER	PROCEEDINGS
		United States of America's unopposed motion to intervene 35. Signed by Judge James Robertson on September 7, 2006. (MT) (Entered: 09/07/2006)
09/07/2006		MINUTE ORDER granting movants' motion for leave to appear as amici curiae 38. Signed by Judge James Robertson on September 7, 2006. (MT) (Entered: 09/07/2006)
09/07/2006	39	AMICUS BRIEF by WASHINGTON LEGAL FOUNDATION. (zlc,) (Entered: 09/08/2006)
09/07/2006	40	AMICUS BRIEF by AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM, COUNCIL OF INSTITUTIONAL

DATE	DOCKET NUMBER	PROCEEDINGS
		INVESTORS, LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION, PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO, SACRAMENTO COUNTY EMPLOYEES' RETIREMENT SYSTEM, TEACHERS INSURANCE AND ANNUITY ASSOCIATION-COLLEGE RETIREMENT EQUITIES FUND. (zlc,) (Entered: 09/08/2006)
09/07/2006	41	Cross MOTION for Summary Judgment by UNITED STATES OF AMERICA. (Attachments: #1 Memorandum in Support #2 Statement PURSUANT TO LOCAL CIVIL RULES 7(H) AND 56.1 #3 RESPONSE TO PLAINTIFFS Statement Of Material Facts NOT IN DISPUTE #4 Text of Proposed Order) (zlc,)

DATE	DOCKET NUMBER	PROCEEDINGS
		(Entered: 09/08/2006)
09/07/2006	42	Memorandum in opposition to re 28 MOTION for Summary Judgment filed by UNITED STATES OF AMERICA. (zlc,) (Entered: 09/08/2006)
09/07/2006	43	MOTION to Conform Briefing Schedule for its Motion for Summary Judgment re 41 MOTION for Summary Judgment by UNITED STATES OF AMERICA. (zlc,) (Entered: 09/08/2006)
09/11/2006	44	MOTION for Extension of Time to File an Amicus Brief by FORMER CHAIRMAN OF THE SECURITIES AND EXCHANGE COMMISSION. (Attachments: #1 Text of Proposed Order) (lc,) (Entered: 09/12/2006)
09/11/2006	45	MOTION for Leave to File AMICI CURIAE MEMORANDUM OF POINTS AND AUTHORITIES IN

DATE	DOCKET NUMBER	PROCEEDINGS
		SUPPORT OF DEFENDANTS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND IN FAVOR OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT by FORMER CHAIRMAN OF THE SECURITIES AND EXCHANGE COMMISSION. (Attachments: #1 Text of Proposed Order #2 Proposed Amicus brief) (lc,) Modified on 9/14/2006 (lc,) (Entered: 09/13/2006)
09/13/2006		MINUTE ORDER granting nunc pro tunc movant's motion for extension of time 44 to September 11, 2006. Signed by Judge James Robertson on September 13, 2006. (MT) (Entered: 09/13/2006)
09/14/2006		MINUTE ORDER granting movant Former Chairman of the SEC's motion for leave to appear as amicus curiae 45. Signed by Judge James Robertson on

DATE	DOCKET NUMBER	PROCEEDINGS
		September 14, 2006. (MT) (Entered: 09/14/2006)
09/14/2006	46	AMICUS BRIEF by FORMER CHAIRMAN OF THE SECURITIES AND EXCHANGE COMMISSION. (lc,) (Entered: 09/20/2006)
09/22/2006	47	REPLY to opposition to motion re 37 Cross MOTION for Summary Judgment, 41 MOTION for Summary Judgment, 28 MOTION for Summary Judgment *Combined With Plaintiffs' Opposition to Defendants' and the United States' Cross-Motions for Summary Judgment* filed by FREE ENTERPRISE FUND, BECKSTEAD AND WATTS, LLP. (Attachments: #1 Statement of Facts Plaintiffs' Statement in Response to Defendants' Statement of Material Facts Not in Genuine Dispute #2 Affidavit Declaration of James Terry #3 Text of Proposed Order) (Vergonis,

DATE	DOCKET NUMBER	PROCEEDINGS
		Christian) (Entered: 09/22/2006)
10/11/2006	48	REPLY to opposition to motion re 41 MOTION for Summary Judgment filed by UNITED STATES OF AMERICA. (Katerberg, Robert) (Entered: 10/11/2006)
10/11/2006	49	REPLY to opposition to motion re 37 Cross MOTION for Summary Judgment filed by CHARLES NIEMEIER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA J. GILLAN, DANIEL L. GOELZER. (Lamken, Jeffrey) (Entered: 10/11/2006)
10/12/2006	50	ERRATA *to Reply Memorandum in Support of Intervenor United States' 48 Cross-Motion for Summary Judgment (dkt. no. 48)* by UNITED STATES OF AMERICA. (Katerberg, Robert) Modified on 10/12/2006 (lc,) (Entered:

DATE	DOCKET NUMBER	PROCEEDINGS
		10/12/2006)
11/06/2006	51	NOTIFICATION OF SUPPLEMENTAL AUTHORITY by FREE ENTERPRISE FUND, BECKSTEAD AND WATTS, LLP (Attachments: #1 Exhibit A #2 Exhibit B #3 Exhibit C #4 Exhibit D) (Vergonis, Christian) Modified on 11/7/2006 (lc,) (Entered: 11/06/2006)
11/08/2006		Set Hearing: Motion Hearing set for 11/17/2006 10:00 AM in Courtroom 23A before Judge James Robertson. (alr) (Entered: 11/08/2006)
11/10/2006	52	Consent MOTION to Continue *Motion Hearing* by CHARLES NIEMEIER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA J. GILLAN, DANIEL L. GOELZER. (Lamken, Jeffrey) (Entered: 11/10/2006)
11/14/2006		Reset Hearings: Motion

DATE	DOCKET NUMBER	PROCEEDINGS
		Hearing set for 12/21/2006 10:00 AM in Courtroom 23A before Judge James Robertson. (alr) (Entered: 11/14/2006)
12/21/2006		Minute Entry for proceedings held before Judge James Robertson: Motion Hearing held on 12/21/2006 re 37 Cross MOTION for Summary Judgment filed by DANIEL L. GOELZER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA J. GILLAN, CHARLES NIEMEIER, 41 MOTION for Summary Judgment filed by UNITED STATES OF AMERICA, 45 MOTION for Leave to File filed by FORMER CHAIRMAN OF THE SECURITIES AND EXCHANGE COMMISSION, 33 MOTION for Leave to File filed by WASHINGTON LEGAL FOUNDATION, 35 Unopposed MOTION to Intervene filed by UNITED

DATE	DOCKET NUMBER	PROCEEDINGS
		STATES OF AMERICA, 32 Joint MOTION for Extension of Time to File Response/Reply as to 28 MOTION for Summary Judgment filed by DANIEL L. GOELZER, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, BILL GRADISON, KAYLA J. GILLAN, CHARLES NIEMEIER, 38 MOTION for Leave to Appear as Amici Curiae filed by CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM, CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, COUNCIL OF INSTITUTIONAL INVESTORS, LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION, PUBLIC

DATE	DOCKET NUMBER	PROCEEDINGS
		EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO, SACRAMENTO COUNTY EMPLOYEES' RETIREMENT SYSTEM, TEACHERS INSURANCE AND ANNUITY ASSOCIATION-COLLEGE RETIREMENT EQUITIES FUND, 28 MOTION for Summary Judgment filed by FREE ENTERPRISE FUND, BECKSTEAD AND WATTS, LLP, 44 MOTION for Extension of Time filed by FORMER CHAIRMAN OF THE SECURITIES AND EXCHANGE COMMISSION, 43 MOTION to Conform Briefing Schedule for its Motion for Summary Judgment re 41 MOTION for Summary Judgment filed by UNITED STATES OF AMERICA. (Court Reporter Rebecca Stonestreet.) (alr) (Entered: 12/21/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
01/29/2007	53	TRANSCRIPT of Motions Hearing held on December 21, 2006 before Judge James Robertson. Court Reporter: Rebecca Stonestreet. The public may view the document in the Clerk's Office between the hours of 9:00 a.m. and 4:00 p.m, Monday through Friday. (lc,) (Entered: 01/29/2007)
02/01/2007	54	NOTICE *of Firm Name Change* by WASHINGTON LEGAL FOUNDATION (Todd, Kathryn) (Entered: 02/01/2007)
02/09/2007	55	NOTICE of Appearance by Helgi C. Walker on behalf of WASHINGTON LEGAL FOUNDATION (Walker, Helgi) (Entered: 02/09/2007)
02/09/2007	56	NOTICE OF WITHDRAWAL OF APPEARANCE as to WASHINGTON LEGAL FOUNDATION. Attorney Kathryn Comerford Todd terminated. (Todd, Kathryn) (Entered:

DATE	DOCKET NUMBER	PROCEEDINGS
		02/09/2007)
03/21/2007	57	MEMORANDUM. Signed by Judge James Robertson on March 21, 2007. (MT) (Entered: 03/21/2007)
03/21/2007	58	ORDER granting defendants' motions for summary judgment 37 41. Signed by Judge James Robertson on March 21, 2007. (MT) (Entered: 03/21/2007)
03/26/2007	59	CLERK'S JUDGMENT in favor of defendants against plaintiff. Signed by Judge James Robertson on 3/26/2007. (alr,) (Entered: 03/26/2007)
04/13/2007	60	NOTICE OF APPEAL as to 59 Clerk's Judgment, 58 Order on Motion for Summary Judgment, by FREE ENTERPRISE FUND, BECKSTEAD AND WATTS, LLP. Filing fee $455, receipt number 1166500. Fee Status: Fee Paid. Parties have been notified. (Vergonis, Christian) (Entered:

DATE	DOCKET NUMBER	PROCEEDINGS
		04/13/2007)
04/16/2007		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 60 Notice of Appeal (lc,) (Entered: 04/16/2007)
04/18/2007		USCA Case Number 07-5127 for 60 Notice of Appeal, filed by BECKSTEAD AND WATTS, LLP, FREE ENTERPRISE FUND. (lc,) (Entered: 04/19/2007)
12/09/2008	61	MANDATE of USCA (certified copy) affirming the judgment of the District Court as to 60 Notice of Appeal, filed by BECKSTEAD AND WATTS, LLP, FREE ENTERPRISE FUND (Attachments: #1 USCA Opinion) (jeb,) (Entered: 12/16/2008)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5127

FREE ENTERPRISE FUND; BECKSTEAD AND WATTS, LLP, PLAINTIFFS-APPELLANTS

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD; BILL GRADISON; DANIEL L. GOELZER; CHARLES NIEMEIER, DEFENDANTS-APPELLEES

UNITED STATES OF AMERICA, INTERVENOR FOR DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	PROCEEDINGS
04/18/2007	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Free Ent Fund, Appellant Beckstead Watts. [1035071-1]
04/18/2007	CLERK'S ORDER filed [1035100] directing Appellant to file [1035100-1]: docketing statement due 5/18/07 for Free Ent Fund; certificate of counsel due 5/18/07 for Free Ent Fund; statement of issues due 5/18/07 for Free Ent Fund; lower court decision due 5/18/07 for Free Ent Fund; any procedural motions due 5/18/07 for Free Ent Fund; transcript status notice due 5/18/07 for Free Ent

DATE	PROCEEDINGS
	Fund; deferred appendix notice due 5/18/07 for Free Ent Fund; appearance form due 5/18/07 for Michael Anthony Carvin; any dispositive motions due 6/4/07 for Free Ent Fund. Directing Appellee to file [1035100-2]: certificate of counsel due 5/18/07 for Pub Co Accounting; any procedural motions due 5/18/07 for Pub Co Accounting; appearance form due 5/18/07 for Robert J. Katerberg, for R. Craig Lawrence, for Joe R. Caldwell; any dispositive motions due 6/4/07 for Pub Co Accounting. [Entry Date: 4/18/07]
04/26/2007	ENTRY OF APPEARANCE filed by Attorney Mark Reiling Freeman for Appellee USA, Mark B. Stern for Appellee USA [1037000-1].
04/26/2007	INITIAL SUBMISSIONS filed by Appellee USA [1037002-1]: certificate of counsel.
05/07/2007	NOTICE filed by Appellant Free Ent Fund FINAL transcript status notice filed [1038931-1]. No transcripts are necessary for this appeal as the case was decided on the pleadings. No certificate of service date listed.
05/07/2007	INITIAL SUBMISSIONS filed by Appellant Free Ent Fund, Appellant Beckstead Watts [1038937-1]: docketing statement; certificate of counsel;

DATE	PROCEEDINGS
	statement of issues; lower court decision; and deferred appendix notice (Deferred Appendix needed = n).
05/07/2007	ENTRY OF APPEARANCE filed by Attorney Michael Anthony Carvin for Appellants Beckstead Watts and Free Ent Fund [1038941-1]
05/07/2007	STATEMENT filed by Appellants Free Ent Fund and Beckstead Watts pursuant to FRAP 26.1 providing corporate disclosure listing [1038944-1] Certificate of Mail Service date 5/7/07.
05/17/2007	ENTRY OF APPEARANCE filed by Attorney Jeffrey Alan Lamken for Appellee Charles Niemeier, Appellee Daniel L. Goelzer, Appellee Kayla J. Gillan, Appellee Bill Gradison, Appellee Pub Co Accounting, Joe R. Caldwell for Appellee Charles Niemeier, Appellee Daniel L. Goelzer, Appellee Kayla J. Gillan, Appellee Bill Gradison, Appellee Pub Co Accounting [1041712-1].
05/17/2007	INITIAL SUBMISSIONS filed by Appellee Pub Co Accounting [1041719-1]: certificate of counsel.
05/17/2007	STATEMENT filed by Appellee Pub Co Accounting pursuant to FRAP 26.1 providing corporate disclosure listing [1041721-1] Certificate of Service date 5/17/07
05/17/2007	CONSENT MOTION filed (5 copies) by

DATE	PROCEEDINGS
	Appellees Pub Co Accounting, et al. (certificate of service dated 5/17/07) requesting an extended initial briefing schedule [1042454-1].
06/18/2007	NOTICE LODGED of intention to participate as amicus curiae [1047796-1] by Movant-Amicus Curiae Cncl Inst Invstr. Certificate of service date 6/18/07. Lodged notice replaced by corrected notice [1050893-01].
06/18/2007	NOTICE filed of intention to participate as amicus curiae [1047797-1] by G. Bradford Cook, Roderick M. Hills, Harold M. Williams, David S. Ruder, Arthur Levitt, Harvey L. Pitt, William Donaldson. Certificate of service date 6/18/07.
06/18/2007	UNOPPOSED MOTION filed (5 copies) by Amicus Curiae for Appellant WA Leg Fdn (certificate of service dated 6/18/07, by mail) for leave to file brief amicus curiae in support of plaintiffs-appellants [1049790-1].
06/18/2007	STATEMENT filed by Amicus Curiae for Appellant WA Leg Fdn pursuant to FRAP 26.1 providing corporate disclosure listing [1049796-1] Certificate of Service date 6/18/07
06/27/2007	CLERK'S ORDER filed [1049806] Upon consideration of the Washington Legal Foundation's unopposed motion for

DATE	PROCEEDINGS
	leave to file brief amicus curiae in support of plaintiffs-appellants, it is ORDERED that the motion be granted [1049790-1]. [Entry Date: 6/27/07]
06/29/2007	CORRECTED NOTICE filed of intention to participate as amicus curiae [1050893-1] by Cncl Inst Invstr. Certificate of service date 6/28/07. This notice replaces the lodged notice [1047796-1].
08/10/2007	INITIAL SUBMISSIONS filed by Amicus Curiae Mtn St Leg Fdn [1059827-1]: certificate as to parties, rulings and related cases.
08/10/2007	STATEMENT filed by Amicus Curiae Mtn St Leg Fdn pursuant to FRAP 26.1 providing corporate disclosure listing [1059829-1] Certificate of Mail Service date 8/9/07.
08/10/2007	MOTION filed (5 copies) by Amicus Curiae Mtn St Leg Fdn (certificate of service dated 8/9/07, by Federal Express) for leave to participate as amicus curiae [1064297-1].
08/31/2007	CLERK'S ORDER filed [1064302] of the motion of Mountain States Legal Foundation for leave to participate as amicus curiae, it is ORDERED that the motion be granted [1064297-1]. The Mountain States Legal Foundation may file a joint amici brief with the

DATE	PROCEEDINGS
	Washington Legal Foundation, pursuant to D.C. Cir. Rule 29(d). [Entry Date: 8/31/07]
10/19/2007	CLERK'S ORDER filed [1074586] granting motion establishing the initial briefing schedule [1042454-1] The following schedule will apply: Appellant's brief due on 12/14/07; Appellant's appendix due on 12/14/07; Amicus Curiae's brief due on 12/31/07; Appellee's brief due on 1/31/08; Appellant's reply brief due on 2/21/08 [Entry Date: 10/19/07]
10/29/2007	CLERK'S ORDER filed [1076020] revising the briefing schedule issued on 10/19/07 as follows: [1076020-1] Appellants' Brief due 12/14/07; Appendix due 12/14/07; Amicus for Appellant's Brief due 12/31/07; Appellees' Brief due 1/31/08; Amicus for Appellee's Brief due 2/15/08; Appellants' Reply Brief due 2/29/08. [Entry Date: 10/29/07]
12/14/2007	BRIEF filed by Appellant Free Ent Fund, Appellant Beckstead Watts [1087295-1]. Copies: 15. Certificate of service date 12/14/07.
12/14/2007	APPENDIX filed by Appellant Free Ent Fund, Appellant Beckstead Watts [1087296-1]. Copies: 10. Certificate of service date 12/14/07.

DATE	PROCEEDINGS
12/31/2007	BRIEF filed by Amicus Curiae for Appellant WA Leg Fdn [1089599-1]. Copies: 15. Certificate of service date 12/31/07.
01/02/2008	BRIEF filed by Amicus Curiae Mtn St Leg Fdn [1091031-1]. Copies: 15. Certificate of service date 12/31/07.
01/16/2008	MOTION filed (5 copies) by Appellee USA (certificate of service dated 1/16/08) to extend time to file [1093409-1] an appellees brief [1076020-1] until 2/14/08.
01/16/2008	OPPOSITION filed [1093415-1] (5 copies) by Appellant Free Ent Fund (certificate of mail service dated 1/16/08) to a motion to extend time [1093409-1].
01/23/2008	CLERK'S ORDER filed [1093923] granting motion extend time filed by USA [1093409-1] only to the extent that the following revised briefing schedule shall now apply: [1076020-1] Appellee's brief due on 2/7/08; Amicus Curiae's brief due on 2/22/08; Appellant's reply brief due on 3/7/08 [Entry Date: 1/23/08]
02/07/2008	BRIEF filed by Appellee USA [1098115-1]. Copies: 15. Certificate of service date 2/7/08.
02/08/2008	BRIEF filed by Appellee Pub Co Accounting [1098385-1]. Copies: 15. Certificate of service date 2/7/08.

DATE	PROCEEDINGS
02/20/2008	CLERK'S ORDER filed [1099814] to schedule oral argument [1099814-1] before Judge Initials: DBS JWR JRB on 4/15/08 at 9:30 AM. [Entry Date: 2/20/08]
02/22/2008	BRIEF filed by Amicus Curiae Cncl Inst Invstr [1100836-1]. Copies: 15. Certificate of mail service date 2/21/08.
02/22/2008	BRIEF filed by Amicus Curiae G. Bradford Cook, Amicus Curiae Roderick M. Hills, Amicus Curiae Harold M. Williams, Amicus Curiae David S. Ruder, Amicus Curiae Arthur Levitt, Amicus Curiae Harvey L. Pitt, and Amicus Curiae William Donaldson [1100846-1]. Copies: 15. Certificate of mail service date 2/22/08.
03/07/2008	REPLY BRIEF filed by Appellants Free Enterprise Fund, et al. [1104184-1]. Copies: 15. Certificate of mail service date 3/7/08.
03/21/2008	UNOPPOSED MOTION filed [1107540] by Kayla J. Gillan, Daniel L. Goelzer, Bill Gradison, Charles Niemeier and Public Company Accounting Oversight Board to dismiss Appellee Kayla J. Gillan [07-5127]
04/01/2008	LETTER FILED [1108850] by appellees Public Company Accounting Oversight Board, et al. pursuant to FRAP 28j advising of additional authorities

DATE	PROCEEDINGS
	[Service Date: 03/31/2008] [07-5127]
04/02/2008	RESPONSE FILED [1108956] by Beckstead and Watts, LLP and Free Enterprise Fund to letter Rule 28j authorities [1108850-2] [Service Date: 04/01/2008] [07-5127]
04/04/2008	CLERK'S ORDER filed [1109376] changing oral argument panel. Case now scheduled before Judges ROGERS, BROWN, KAVANAUGH 04/15/2008 9:30 AM [07-5127]
04/08/2008	FORM from Arguing Attorney – 1. Arguing Person Information Updated for: Jeffrey Alan Lamken arguing for Appellees Public Company Accounting Oversight Board, Bill Gradison, Kayla J. Gillan, Daniel L. Goelzer, and Charles Niemeier [07-5127]
04/09/2008	FORM from Arguing Attorney – 4. Arguing Person Information Updated for: Mark B. Stern arguing for Appellee United States of America [07-5127]
04/09/2008	PER CURIAM ORDER filed [1110086] allocating oral argument time as follows: Petitioner – 20 Minutes, Respondent – 20 Minutes; directing party to file Form 72 notice of arguing attorney due 04/11/2008 [07-5127]
04/10/2008	FORM from Arguing Attorney – 3. Arguing Person Information Updated for: Michael Anthony Carvin arguing for

DATE	PROCEEDINGS
	Appellants Free Enterprise Fund and Beckstead and Watts LLP [07-5127]
04/14/2008	PER CURIAM ORDER filed [1110664] granting motion to terminate party in case [1107540-2] Kayla J. Gillan in 07-5127. Judges Rogers, Brown and Kavanaugh [07-5127]
04/15/2008	ORAL ARGUMENT HELD before Judges Rogers, Brown and Kavanaugh [07-5127]
04/21/2008	TRANSCRIPT [1112106] of oral argument [07-5127]
05/15/2008	TRANSCRIPT [1116566] of oral argument [07-5127] This is a revised transcript.
08/22/2008	PER CURIAM JUDGMENT filed [1134686] Affirmed for the reasons in the accompanying opinion. Judges Rogers, Brown and Kavanaugh [07-5127]
08/22/2008	OPINION filed [1134687] (Pages: 34) for the Court by Judge Rogers; DISSENTING OPINION (Pages: 58) by Judge Kavanaugh [07-5127]
08/22/2008	CLERK'S ORDER filed [1134688] withholding issuance of the mandate. [07-5127]
09/19/2008	PETITION filed [1140124] by Appellants Beckstead and Watts, LLP and Free Enterprise Fund for rehearing,

DATE	PROCEEDINGS
	for rehearing en banc. [Service Date: 09/19/2008] Copies: 20 (En Banc Filing); Pages: 11-15; Disclosure Statement: Attached; Certificate of Parties: Attached [07-5127]
09/23/2008	CLERK'S ORDER filed [1140146] directing response to petition for rehearing [1140124-2] The response may not exceed 15 pages. Response to Petition due 10/08/2008 [07-5127]
09/26/2008	UNOPPOSED MOTION filed [1140960] by appellee USA to extend time to file response to appellants' petition for rehearing and rehearing en banc until 10/22/2008 [Service Date: 09/26/2008] [07-5127]
09/29/2008	CLERK'S ORDER filed [1140968] granting motion to extend time [1140960-2] Any response to the petition for rehearing and rehearing en banc is now due 10/22/2008 [07-5127]
10/22/2008	RESPONSE FILED [1147074] by USA to petition for rehearing en banc [1140124-3], petition for rehearing [1140124-2] [Service Date: 10/22/2008] Copies: 20 (En Banc Filing); Pages: 11-15; Disclosure Statement: Not Applicable to this Party; Certificate of Parties: Previously Filed [07-5127]
10/22/2008	RESPONSE FILED [1147090] by Daniel L. Goelzer, Bill Gradison, Charles

DATE	PROCEEDINGS
	Niemeier and Public Company Accounting Oversight Board to petition for rehearing en banc [1140124-3], petition for rehearing [1140124-2] [Service Date: 10/22/2008] Copies: 20 (En Banc Filing); Pages: 11-15; Disclosure Statement: Attached; Certificate of Parties: Attached [07-5127]
11/17/2008	PER CURIAM ORDER, En Banc, filed [1149477] denying petition for rehearing en banc [1140124-3] Judges Sentelle, Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith and Kavanaugh [07-5127] (Chief Judge Sentelle and Circuit Judges Ginsburg, Griffith, and Kavanaugh would grant the petition for rehearing en banc)
11/17/2008	PER CURIAM ORDER filed [1149479] denying petition for rehearing [1140124-2] Judges Rogers, Brown and Kavanaugh [07-5127] (Circuit Judge Kavanaugh would grant the petition for rehearing)
12/03/2008	MANDATE ISSUED to Clerk, District Court [07-5127]
01/09/2009	LETTER filed [1159459] by the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: A petition for writ of certiorari was filed and

DATE	PROCEEDINGS
	placed on the docket as 08-861, 01/05/2009. [07-5127]
05/21/2009	LETTER filed [1182160] by the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: The petition for writ of certiorari was disposed of on 05/18/2009, with Granted. [07-5127]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREE ENTERPRISE FUND,	)
Suite 800	)
1850 M Street, N.W.	)
Washington, DC 20036	)
and	)
BECKSTEAD AND WATTS, LLP,	)
2425 W. Horizon Ridge Parkway	)
Henderson, NV 89052	)
Plaintiffs,	)
v.	)
	)
THE PUBLIC COMPANY	)
ACCOUNTING OVERSIGHT	)
BOARD	)
1666 K Street, N.W.	)
Washngton, DC 20006	)
and	)
BILL GRADISON, KAYLA J.	)
GILLAN, DANIEL L. GOELZER,	)
and CHARLES NIEMEIER,	)
in their official capacities as	)
Members of the Public Company	)
Accounting Oversight Board	)
1666 K Street, N.W.	)
Washington, DC 20006	)
Defendants.	)

CASE NUMBER 1:06CV00217
JUDGE: James Robertson
DECK TYPE: Civil Rights (non-employment)
DATE STAMP: 02/07/2006

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The Free Enterprise Fund and Beckstead and Watts, LLP, by and through their undersigned attorneys, allege as follows:

INTRODUCTION

1. This is an action challenging the formation and operation of the Public Company Accounting Oversight Board (the "Board"), an entity created by the Sarbanes-Oxley Act of 2002 (the "Act") to "oversee the audit of public companies that are subject to the securities laws." In carrying out this mandate, the Board is authorized to and does exercise broad governmental power, including the power to "enforce compliance" with the Act and the securities laws, to regulate the conduct of auditors through rulemaking and adjudication, and to set its own budget and to fund its own operations by fixing and levying a tax on the nation's public companies. As a result, and notwithstanding the Act's effort to characterize the Board as a private corporation, the Board is a government entity subject to the limits of the United States Constitution, including the Constitution's separation of powers principles and the requirements of the Appointments Clause. The Board's structure and operation, including its freedom from Presidential oversight and control and the method by which its members are appointed, contravene these principles and requirements. For this reason, the Board and all power and authority exercised by it violate the Constitution.

2. Referred to by one Senator as an entity with "massive unchecked powers," the Board exercises broad discretion to set policy and impose regulations

governing the conduct of public accounting firms. In connection with its open-ended mandate, the Board's five members — appointed for five-year terms by the Securities Exchange Commission (SEC) — have the power to set the Board's budget at any level they desire, and to fund the Board's operations through a "fee" levied on all public companies. The Board also has the power to promulgate auditing standards and rules, including rules that expand upon the Act's list of nonaudit services that accounting firms are prohibited from offering to a client contemporaneously with an audit. Under the Act, moreover, any violation of the Board's rules constitutes a violation of the federal securities laws, subjecting accountants and accounting firms to potential civil and criminal liability.

3. The Board also exercises core executive powers to "enforce compliance" with the Act by conducting periodic inspections of accounting firms and subjecting those firms to investigations and disciplinary proceedings. In connection therewith, the Board has the power to punish accounting firms and individual accountants for the violation of the Board's rules, professional accounting standards or federal law, with sanctions of up to $2,000,000 for inadvertent violations and up to $15,000,000 for knowing or reckless ones.

4. The Board has exercised its broad powers to impose burdensome standards that accounting firms are required to follow when auditing public companies, which ultimately bear the costs of these added procedures. In the Board's first year of operation alone, the Act's regulations resulted in

more than $35 billion in compliance costs imposed on the nation's businesses.

5. In addition to wielding broad rulemaking and enforcement powers, the members of the Board have the authority to set their own salaries. The Board in 2003 paid its chairman an exorbitant salary of $556,000, and paid each of its other four members a similarly excessive salary of $452,000.

6. Because the Board exercises governmental powers, it is, for constitutional purposes, a part of the federal government, and its members — who exercise significant authority pursuant to the laws of the United States — are officers of the United States.

7. Despite its vast authority and the far-reaching consequences of its actions, the Board is immune from the supervision and control of the President. The Board's members are not appointed or removable by the President or by the head of any executive department answerable to him. They are, rather, appointed by the SEC, itself an independent agency. Even the SEC, moreover, exercises only limited review of Board actions. The SEC may only remove Board members if they have "willfully violated" applicable laws or regulations, "willfully abused" their authority, or "failed to enforce" applicable laws and regulations "without reasonable justification or excuse." The SEC's other review functions are similarly circumscribed. Thus, the Board exercises wide-ranging, core governmental powers immune from presidential oversight in contravention of the most fundamental elements of the Constitution's separation of powers principles.

8. In addition, although the Board members exercise significant, core governmental powers, they

are appointed by the SEC rather than in the manner required by Article II of the Constitution. Their appointments, and the Board's exercise of its delegated powers, are therefore contrary to the Appointments Clause of the Constitution.

9. The Board is also the recipient of improperly and unconstitutionally delegated legislative power, including, but not limited to, its broad power to enact law, its authority to set its own budget without any constraint or legislative cap, and its authority to fund that budget through the imposition of a tax on all public companies.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 2201. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and (e).

PARTIES

11. Plaintiff Free Enterprise Fund ("FEF") is a non-profit public-interest organization under Section 501(c)(4) of the Internal Revenue Code with offices in the District of Columbia. FEF promotes economic growth, lower taxes, and limited government through television and radio issue advertising campaigns, providing timely and tactical policy guidance to members of Congress and publishing strategic game plans on vital economic and fiscal issues. In bringing this lawsuit, FEF seeks to vindicate the interests of its members, who are subject to the Board's authority and have been injured by the regulations imposed by the Board.

12. Plaintiff Beckstead and Watts, LLP ("Beckstead and Watts"), is a public accounting firm

that specializes in audits of small publicly traded corporations. Beckstead and Watts is registered with the Board pursuant to Section 102 of the Act and, as a result, is subject to the Board's regulatory authority.

13. Defendant Public Company Accounting Oversight Board purports to be a private, nonprofit corporation established by the Act and subject to, and having the powers conferred upon nonprofit corporations under, the District of Columbia Nonprofit Corporation Act. The Board has a principal office located in the District of Columbia. Notwithstanding the Act's declarations to the contrary, the Board is an agency and/or establishment and/or instrumentality of the United States.

14. Defendant Bill Gradison is a Member of the Board and is the Board's Acting Chairman. As a member, he is responsible for carrying out the powers delegated to the Board by the Act. Mr. Gradison is sued in his official capacity.

15. Defendant Kayla J. Gillan is a Member of the Board. As a member, she is responsible for carrying out the powers delegated to the Board by the Act. Ms. Gillan is sued in her official capacity.

16. Defendant Daniel L. Goelzer is a Member of the Board. As a member, he is responsible for carrying out the powers delegated to the Board by the Act. Mr. Goelzer is sued in his official capacity.

17. Defendant Charles D. Niemeier is a Member of the Board. As a member, he is responsible for carrying out the powers delegated to the Board by the Act. Mr. Niemeier is sued in his official capacity.

FACTS

I. The Creation of the Board

18. In 2002, in reaction to the highly publicized accounting scandals involving Enron and other public companies, Congress hastily enacted new legislation regulating the accounting industry and creating standards and oversight for public accountants and auditors.

19. During congressional discussions of various proposals for an agency to regulate accountants and auditors, Senator Gramm, a supporter of the Act, remarked that the agency would be "a strange kind of entity [in that we] want it to be private, but we want it to have governmental powers."

20. Senator Gramm also remarked that the proposed entity "is going to have massive power, unchecked power, by design. . . . We are setting up a board with massive power that is going to make decisions that affect all accountants and everybody they work for, which directly or indirectly is every breathing person in the country."

21. Congress passed the Act on July 25, 2005, and President Bush signed it into law on July 30, 2005.

22. Among other things, the Act imposes significant new rules governing auditor independence and corporate responsibility for financial reports. It requires enhanced financial disclosures, imposes new and enhanced criminal penalties for corporate fraud and white-collar crime and provides the SEC with new enforcement powers. In addition, Title I of the Act creates and empowers the Board.

II. The Organization of the Board

23. Section 101(a) of the Act makes clear that the Board's purpose is the furtherance of governmental objectives. That provision establishes the Board "to oversee the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate and independent audit reports for companies the securities of which are sold to, and held by and for, public investors." Section 101(a) of the Act further provides that the Board "shall be a body corporate, operate as a nonprofit corporation, and have succession until dissolved by an Act of Congress."

24. Section 101(b) of the Act provides that, except as otherwise provided in the Act, the Board shall be subject to, and have all the powers conferred upon a nonprofit corporation by, the District of Columbia Nonprofit Corporation Act.

25. The Act purports to establish the Board's status as a non-governmental entity and the status of its officers and employees as non-governmental actors. To this end, the Act declares in Section 101(b) that "[t]he Board shall not be an agency or establishment of the United States Government" and "[n]o member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service."

26. Section 101(e) of the Act provides that the Board shall have five full-time members, including a chairperson. The same provision imposes the conditions that two, and no more than two, of the

Board's members must be (or have been) certified public accountants, and that, if one of those two members is the chairperson, he may not have been a practicing certified public accountant for at least five years prior to his appointment to the Board.

27. Section 101(e) of the Act vests in the SEC as a whole the power to appoint the Board's initial members and fill all subsequent vacancies. The SEC shall make such appointments "after consultation with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury."

28. The Act provides that the members of the Board shall serve for staggered five-year terms. It provides that a member of the Board may be removed only by the SEC and only for "good cause shown," which the Act narrowly defines as a finding, after notice and an opportunity for a hearing, that such member "(A) has willfully violated any provision of th[e] Act, the rules of the Board or the securities laws; (B) has willfully abused the authority of that member; or (C) without reasonable justification or excuse, has failed to enforce compliance [by a registered firm or associated person] with any such provision or rule, or any professional standard."

29. Section 101(c) sets forth the following duties of the Board: (i) to register public accounting firms that prepare audit reports for issuers; (ii) to establish and/or adopt quality control, ethics, independence and other standards relating to the preparation of audit reports for issuers; (iii) to conduct regular inspections of registered public accounting firms; (iv) to conduct investigations and disciplinary proceedings concerning, and to impose appropriate

sanctions where justified upon, registered public accounting firms and associated persons of such firms; (v) to perform such other duties or functions as the Board or the SEC determines are necessary or appropriate to promote high professional standards among, and improve the quality of audit services offered by, registered public accounting firms and associated persons thereof, or otherwise to carry out the Act, in order to protect investors, or to further the public interest; (vi) to enforce compliance with the Act, the Board's rules, professional standards, and the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, by registered public accounting firms and associated persons thereof; and (vii) to set the Board's budget and manage the operations of the Board and its staff.

30. Section 101(f) of the Act provides that the Board shall have, *inter alia*, the additional powers to sue and be sued, complain and defend, in its corporate name and through its own counsel, with the approval of the SEC, in any federal, state or other court; to conduct operations and maintain offices without regard to any provision of state law; to acquire property; and to enter into contracts.

31. Section 101(h) of the Act requires the Board to submit an annual report to the SEC, which in turn is required to transmit a copy of that report to specified committees of the Senate and House of Representatives.

III. The Regulatory Authority of the Board

32. As detailed below, the Act grants the Board substantial regulatory authority over public accounting firms and their employees, including the

authority to "enforce compliance" with federal law, to promulgate rules, to inspect, to investigate, to conduct disciplinary proceedings and to impose sanctions. The Act even provides that failure to comply with a rule of the Board constitutes a violation of federal law, thereby subjecting accounting firms and individual accountants to potential civil and criminal liability.

33. Section 102 of the Act establishes a mandatory system of registration for public accounting firms by making it unlawful for any person that is not a registered firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer. (The Act's broad definition of "issuer" includes all companies whose securities are registered under the Securities Exchange Act of 1934.) Section 102 establishes procedures for, and provides that the Board may by rule prescribe additional procedures for, the submission of applications for registration.

34. Each registered corporation is required to submit an annual report to the Board, and may be required to provide the Board with such additional information as the Board or the SEC may demand.

35. As of January 26, 2006, 1,611 accounting firms were registered with the Board.

36. Section 103 of the Act grants the Board the authority, through its rulemaking powers, to establish "such auditing and related attestation standards, such quality control standards, and such ethics standards to be used by registered public accounting firms in the preparation and issuance of audit reports, as required by this Act or the rules of the [SEC], or as may be necessary or appropriate in

the public interest or for the protection of investors." The Act specifies certain requirements that must be included in these standards.

37. Section 103 of the Act also grants the Board the authority, through its rulemaking powers, to "establish such rules as may be necessary or appropriate in the public interest or for the protection of investors," to implement the auditor-independence requirements set forth in Title II of the Act. Those requirements prohibit a registered accounting firm performing an audit for an issuer from providing certain non-audit services contemporaneously with the audit, including bookkeeping, financial-information-systems design and implementation, appraisal or valuation services, actuarial reports, investment services, legal services, and "any other service that the Board determines, by regulation, is impermissible."

38. In addition to its sweeping authority to ban auditor practices that it deems inappropriate, the Board has broad discretion to "on a case by case basis, exempt any person, issuer, public accounting firm, or transaction from the [Act's] prohibition on the provision of services" to the extent that the Board deems such exemption "necessary or appropriate in the public interest and . . . consistent with the protection of investors."

39. Section 3 of the Act provides that a violation of the Board's rules "shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934" and that the person committing such violation "shall be subject to the same penalties, and to the same extent, as for a violation of that Act." Such penalties include civil

fines and, for willful violations, criminal sanctions, including up to twenty years in prison.

IV. The Enforcement Authority of the Board

40. Section 104 of the Act grants the Board the authority to "conduct a continuing program of inspections to assess the degree of compliance of each registered public accounting firm with th[e] Act, the rules of the Board, the rules of the [SEC], or professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers." The frequency of such inspections shall depend upon the number of issuers for which the registered public accounting firm regularly provides audit reports, with firms that regularly provide audit reports for more than 100 issuers to be inspected annually. Upon uncovering a violation, the Board is required to report that violation, "if appropriate," to the SEC and appropriate state regulatory authority, and to begin a formal investigation or take disciplinary action, "if appropriate," with respect to any such violation.

41. Section 105 of the Act grants the Board the power to "conduct an investigation of any act or practice, or omission to act, by a registered public accounting firm, any associated person of such firm, or both, that may violate" the Act, the rules of the Board, the securities laws, or professional standards. The Act also grants the Board the authority to establish, through its rulemaking power, "fair procedures for the investigation and disciplining of registered public accounting firms and associated persons of such firms."

42. In conducting an investigation under Section 105 of the Act, the Board is empowered to require

testimony and demand documents, including audit work papers, from a registered public accounting firm or associated person. The Act allows the Board to sanction firms or associated persons who refuse to produce testimony or documents or to otherwise cooperate in an investigation.

43. In addition, the Board is empowered to request testimony and documents from any other person, including any client of a registered public accounting firm, and to seek the issuance of a subpoena by the SEC to require such testimony and documents.

44. If the Board determines that a registered public accounting firm or associated person has violated the Act, the Board's rules, the relevant securities laws or professional standards, "the Board may impose such disciplinary or remedial sanctions as it determines appropriate," including temporary suspension or permanent revocation of an accounting firm's registration or of an associated person's right to further association with any registered firm; civil monetary penalties of up to $2,000,000 for inadvertent violations and up to $15,000,000 for knowing or reckless violations; and "any other appropriate sanction provided for in the rules of the Board."

V. The Funding Authority of the Board

45. The Act also grants the Board the extraordinary power to set its own budget and fund its own activities by levying a tax on public companies.

46. Section 109(b) of the Act empowers the Board to establish a budget for each fiscal year. The Act

provides no guidance as to or statutory cap on the size of the budget.

47. Section 109(c) of the Act provides that funds to cover the Board's annual budget, less any registration or annual fees collected from public accounting firms, are to be payable from annual "accounting support fees" collected from issuers pursuant to standards established by the Board.

48. Section 109(d) of the Act empowers to Board to establish a "reasonable" annual accounting support fee, or a formula for the computation thereof, as may be necessary or appropriate to establish and maintain the Board. Section 109(d) further provides that rules of the Board relating to the annual accounting support fee shall provide for the equitable allocation, assessment, and collection by the Board (or an agent thereof) of the fee among issuers, allowing for differentiation "among classes of issuers." Section 109(g) of the Act provides that any amount due from issuers shall be allocated among and payable by each issuer (or, if applicable, by each issuer in a particular class) in an amount based on the ratio of the issuer's average monthly equity market capitalization to the overall average monthly equity market capitalization of all such issuers.

49. On April 18, 2003, the Board issued final rules with respect to the allocation, assessment and collection of its accounting fees. These rules were approved by the SEC on August 1, 2003.

50. Pursuant to the Board's rules, the Board calculates an accounting support fee for each year, equal to the budget of the Board less the sum of all registration fees and annual fees received during the previous calendar year from public accounting firms.

51. Pursuant to the Board's rules, the Board subjects to the accounting support fee, with certain exceptions, (i) all non-investment-company issuers whose average monthly market capitalization during the preceding calendar year is greater than $25 million and whose share price on a monthly or more frequent basis is publicly available, and (ii) all investment-company issuers whose average monthly market capitalization is greater than $250 million and whose share price on a monthly or more frequent basis is publicly available.

52. Pursuant to Board rules, each issuer is required to pay its share of the accounting support fee. The Board will use its best efforts to send a notice to each issuer, but the failure to send such notice does not relieve the issuer of the obligation to pay or otherwise waive the Board's right to seek payment of the issuer's share.

53. Subject to certain narrow exceptions, no registered public accounting firm shall sign an unqualified audit opinion with respect to an issuer's financial statements, or issue a consent to include a previously issued audit opinion, unless the registered public accounting firm has ascertained that the issuer has outstanding no past-due share of the accounting support fee or has petitioned the Board for a correction.

54. The failure of an issuer to pay the accounting support fee constitutes a violation of Section 13(b)(2) of the Securities Exchange Act of 1934, as amended by the Act. The Board is required to refer to the SEC the failure by an issuer to pay its share of the accounting support fee.

VI. The SEC's Nominal Oversight of the Board

55. SEC oversight of the Board's activities is limited to only some of the Board's functions. The SEC does not exercise day-to-day control over the Board, has no control over the conduct of the Board's regular inspections, and exercises no oversight over decisions to bring an investigation or the manner in which an investigation is carried out. As noted above, moreover, the SEC's power to remove Board members is extremely limited, with removal permitted only for a member's willful violation of the law, willful abuse of authority, or inexcusable failure to enforce the Act.

56. Even where SEC approval or oversight of Board action exists, the SEC's role is minimal. For example, the SEC is required by the Act to approve any rule proposed by the Board so long as it is merely "consistent with the requirements" of the Act and the securities laws, "or is necessary or appropriate in the public interest or for the protection of investors."

57. The SEC's power to censure or impose limitations upon the activities, functions and operations of the Board is also extremely limited and may only be exercised if the SEC finds, on the record and after notice and opportunity for a hearing, that the Board "(A) has violated or is unable to comply with a provision of this Act, the rules of the Board, or the securities laws; or (B) without reasonable justification or excuse, has failed to enforce compliance [by a registered firm or associated person] with any such provision or rule, or any professional standard."

58. The SEC's review of Board sanctions is similarly limited. The Board is required by the Act to

file notice of a final sanction with the SEC, which is empowered to review the sanction on its own motion or by application by the sanctioned party. The SEC must affirm a sanction if the sanction was "applied in a manner, consistent with the purposes" of the Act. By contrast, the SEC may modify or set aside the sanction only if "having due regard for the public interest and the protection of investors, [it] finds . . . that the sanction—(A) is not necessary or appropriate in furtherance of this Act or the securities laws; or (B) is excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed."

59. The Act also permits a public accounting firm to seek review by the SEC if it disagrees with any final assessments contained in a final inspection report prepared by the Board. The Act does not set forth the applicable standard of review.

60. SEC review of the Board's budgetary decisions is similarly minimal. The Act provides that the Board's budget and the annual accounting support fee are subject to the approval of the SEC, but does not provide any standards for the SEC to use in evaluating the budget and the fee. Moreover, because the Board's budget is funded through a tax on public companies, rather than through limited appropriations, the SEC has every incentive to allow the Board to spend freely.

VII. The Board's Operations

61. On October 25, 2002, the five commissioners of the SEC voted on the appointment of the first five members of the Board. The chairman of the Board was appointed by a vote of three to two, and the other four members of the Board were appointed by votes of

four to one. One of the SEC commissioners stated that the selection process was "inept and seriously flawed."

62. The Board thereafter promulgated a series of rules and auditing standards, all of which were approved by the SEC.

63. The Board's auditing standards impose specific and substantial new duties on registered accounting firms and persons associated with such firms. For example, Auditing Standard No. 1 requires accounting firms to affirm, in each audit report, that the audit was performed in accordance with the standards of the Board. Auditing Standard No. 2 sets forth over 150 pages of detailed requirements concerning the scope and reporting of an accounting firm's audit of a public company's internal controls over financial reporting. And Auditing Standard No. 3 prescribes detailed requirements for the documentation that a registered accounting firm is required to prepare and retain in connection with its audits of public companies.

64. These burdensome standards have imposed substantial compliance costs on registered accounting firms and their public-company clients. Smaller accounting firms have been especially hard hit by the costs of complying with the Board's standards. As a result, many smaller accounting firms have been forced to give up auditing public companies altogether, reducing public companies' range of choices among accountants and increasing concentration in the accounting industry.

65. The Board has funded its activities through the assessment on issuers of "accounting support fees." In 2003, for example, approximately 8,424

companies paid approximately $51 million to support the Board during its first year of operations.

66. In 2004, the Board's budget was approximately $103 million and was financed by the payment of fees by issuers. The Board started that year with 126 employees and ended the year with 262 employees.

67. The Board's budget for 2005 calls for expenditures of approximately $136 million, again financed through the collection of accounting support fees from issuers. The Board expected to end the year with 450 employees.

68. As of February 1, 2006, approximately 10,000 issuers had paid an accounting support fee.

VIII. Beckstead and Watts's Efforts to Comply With the Board's Standards

69. Plaintiff Beckstead and Watts is an accounting firm located in Henderson, Nevada, and engaged in the business of auditing companies and issuing audit reports.

70. As a small "niche" firm, Beckstead and Watts focuses its auditing business on "micro-cap" and "development stage" companies. Such companies generally have no operations, limited assets and insignificant market capitalization. They present a comparatively high level of investment risk, as is understood by investors. Indeed, at the time of the events described herein, a majority of Beckstead and Watts's clients had "going-concern" audit reports and significant non-operating losses, facts which highlight the degree of risk posed to the potential investor.

71. Beckstead and Watts's client base has typically included public companies with securities trading on the Over-the-Counter Bulletin Board Exchange. Because these clients are issuers under the Act, Beckstead and Watts registered with the Board pursuant to Section 102 of the Act.

72. The Board's promulgation of the Auditing Standards described above has caused substantial increases in the time and expense of the public-company audits conducted by Beckstead and Watts. For example, the Board's standards have added numerous layers of additional audit steps and documentation requirements above those imposed by existing professional standards.

73. Because its typical audit clients are generally too small to absorb the entirety of these increased costs and compliance standards, Beckstead and Watts lost a substantial amount of clients and profits as a result of the Board's actions.

74. Seven inspectors from the Board visited the office of Beckstead and Watts over a two-week period, from May 17 to 28, 2004. These inspectors evaluated Beckstead and Watts's audits in the same manner that one would evaluate the audits of a Fortune 1000 company, notwithstanding the costs issues discussed above and the relative benefits (or lack thereof) to the investing public of applying such strict standards to this segment of the marketplace.

75. Applying the Board's standards in such a manner, the Board's inspectors identified numerous auditing deficiencies with respect to Beckstead and Watts's audits of its clients.

76. The Board prepared a draft inspection report and permitted Beackstead and Watts to comment upon it.

77. In an effort to remedy some of the defects identified by the Board, Beckstead and Watts reduced the number of clients with which it had an auditor relationship from over sixty SEC-reporting companies to just over ten. This reduction in Beckstead and Watts's public-company client base led to a further reduction in Beckstead and Watts's revenues and profits for the fiscal year ended 2005 as compared to the fiscal year ended 2004.

78. On September 28, 2005, the Board issued the final report based on the May 2004 inspection. This report requires Beckstead and Watts to address the Board's concerns to the Board's satisfaction within twelve months of the issuance of the report.

79. At the same time it issued the final report, the Board initiated formal investigation proceedings against Beckstead and Watts, subjecting the company to burdensome discovery, including the pulling of company files and the taking of testimony from one of its principals and one of its employees. This investigation and discovery is currently ongoing.

80. Beckstead & Watts has incurred legal fees in defending itself against the investigation proceedings, and its professional reputation has been damaged by the inspection report posted on the Board's public website.

COUNT I

(Violation of the Separation of Powers — Improper Exercise of Executive Power)

81. Plaintiff realleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

82. The Constitution provides that "[t]he executive Power shall be vested in a President," U.S. Const., art. II, § 1, and that "he shall take Care that the Laws be faithfully executed," U.S. Const., art. II, § 2. These provisions vest all executive power, including the power to enforce the law, in the President of the United States.

83. As set forth above, the Board exercises wide-ranging executive power, including the power to "enforce compliance" with the Act and the securities laws, to enact wide-ranging rules and regulations, to conduct inspections of registered public accounting firms, to conduct investigations and disciplinary proceedings, and to impose sanctions and otherwise to enforce compliance with the Act, the rules of the Board, professional standards, and the securities laws. In addition, the Board is entitled to sue and be sued, complain and defend, in its corporate name and through its own counsel, with the approval of the SEC, in any federal, state, or other court.

84. The Board's wide-ranging exercise of executive or administrative power is immune from Presidential supervision or control. The Board's members are not appointed or removable by the President. They are, rather, appointed by the SEC, itself an independent agency. Even the SEC, moreover, exercises only limited review of Board actions. The SEC may remove Board members only

if they have "willfully violated" applicable laws or regulations, "willfully abused" their authority, or "failed to enforce" applicable laws and regulations "without reasonable justification or excuse." The SEC's other review functions are similarly circumscribed.

85. The Board's exercise of wide-ranging, core executive power, immune from Presidential oversight, impermissibly impedes and undermines the President's ability to perform his constitutional duties and prerogatives. As a result, the creation of the Board, as well as its implementation of its delegated responsibilities under the Act, violates the separation of powers.

COUNT II

(Violation of the Appointments Clause of the U.S. Constitution)

86. Plaintiff realleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

87. Notwithstanding the Act's statements to the contrary, the Board is a public entity and/or an agency and/or an instrumentality of the United States subject to the constraints imposed on the federal government by the Constitution. Facts supporting the status of the Board as a public rather than a private entity, set forth more fully in the preceding paragraphs, include:

- The Board was created by special law.
- The SEC was authorized to appoint the Board's five initial members and is authorized to appoint all subsequent members.

- The Board was created to further government objectives of "protect[ing] the interests of investors and further[ing] the public interest."
- The Board has the authority to engage in quintessentially governmental tasks, including making rules the violation of which constitutes a violation of federal law; enforcing federal law through investigation and adjudication; and setting its own budget and funding that budget through the imposition of taxes on public companies.

88. Because the Board is an agency and/or instrumentality of the United States, and because, as described in the preceding paragraphs, its members exercise significant authority pursuant to the laws of the United States, those members are, notwithstanding provisions of the Act to the contrary, officers of the United States whose appointments must comply with the Appointments Clause of the United States Constitution (art. II, sec. 2).

89. The Appointments Clause provides in relevant part that the President of the United States "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

90. By virtue of the wide-ranging discretion, duties, functions and independence of the Board,

members of the Board are principal officers whose appointments must be made by the President by and with the advice and consent of the Senate. Accordingly, the appointment of Board members by the SEC violates the Appointments Clause.

91. In the alternative, the members of the Board are inferior officers whose appointments must be made by the President, a court of law, or the head of a department. Because the SEC is not a department within the meaning of the Clause and, in all events, the appointment power is not vested in the head of the SEC but rather in the SEC as a whole, the appointment of Board members by the SEC violates the Appointments Clause.

92. The Act's requirements that the SEC consult with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury prior to appointment of the members of the Board, that two of the members of the Board must be members of the accounting profession, and that three of the members must not be members of the accounting profession, constitute improper limitations on the power to appoint, in further violation of the Appointments Clause.

COUNT III

(Unconstitutional Delegation)

93. Plaintiff realleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

94. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1.

95. By virtue of the grant of wide-ranging authority to the Board, the Act improperly and unconstitutionally delegates legislative power to an entity outside the Legislative Branch. This delegation is unconstitutional if the Board is deemed part of the federal government, and is even more problematic if the Board is deemed to be a private entity.

PRAYER FOR RELIEF

Wherefore, plaintiffs pray for the following relief:

1. an order and judgment declaring unconstitutional the provisions of the Act creating and empowering the Board;

2. an order and judgment enjoining the Board and its Members from carrying out any of the powers delegated to them by the Act;

3. an order and judgment enjoining the Board and its Members from taking any further action against Plaintiff Beckstead and Watts and nullifying and voiding any prior adverse action against Beckstead and Watts;

4. costs and attorneys' fees pursuant to any applicable statute or authority;

5. any other relief that this Court deems just and appropriate.

Date: February 7, 2006

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREE ENTERPRISE FUND *et al.*,	)
Plaintiffs,	)
v.	)
THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, *et al.*,	)
Defendants.	)

Civil Action No. 1:06-cv-00217-JR

DECLARATION OF NANCY M. MORRIS

I, Nancy M. Morris, hereby declare as follows:

1. I currently serve as the Secretary of the Securities and Exchange Commission.

2. In my capacity as Secretary, I am the official custodian of the records of Commission actions.

3. I have examined the Commission's records with respect to the appointment of members of the Public Company Accounting Oversight Board. Those records show the following:

a. On October 25, 2002, the Commission voted to appoint William H. Webster as Chairman of the Board and Daniel L. Goelzer, Kayla J. Gillan, Willis D. Gradison, and Charles D. Niemeier to the Board. The Chairman of the Commission voted in favor of these appointments.

b. On January 7, 2003, the Commission voted to appoint Charles D. Niemeier as Acting

Chairman of the Board. The Chairman of the Commission voted in favor of this appointment.

c. On May 21, 2003, the Commission voted to appoint William J. McDonough as Chairperson of the Board. The Chairman of the Commission voted in favor of this appointment.

d. On October 22, 2003, the Commission voted to re-appoint Charles D. Niemeier to the Board. The Chairman of the Commission voted in favor of this appointment.

e. On August 5, 2004, the Commission voted to re-appoint Willis D. Gradison to the Board. The Chairman of the Commission voted in favor of this appointment.

f. On December 2, 2005, the Commission voted to appoint Willis D. Gradison as acting Chairman of the Board. The Chairman of the Commission voted in favor of this appointment.

g. On June 19, 2006, the Commission voted to appoint Mark W. Olson to the Board and to re-appoint Kayla J. Gillan to the Board. The Chairman of the Commission voted in favor of these appointments.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 31, 2006.

/s/ Nancy M. Morris
Nancy M. Morris

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREE ENTERPRISE FUND, *et al.*,	)
Plaintiffs,	)
v.	)
THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, *et al.*,	)
Defendants.	)

Case No. 1:06CV00217-JR

DECLARATION OF JAMES TERRY

I, James Terry, hereby declare as follows based on personal knowledge:

1. I am the Executive Director of the Free Enterprise Fund ("FEF").

2. FEF is a membership organization whose purpose is to promote economic growth through, among other things, lower taxes and limits on government regulation of private business. FEF filed this lawsuit to advance that purpose.

3. Because FEF at times takes politically unpopular positions, FEF's general policy is not to disclose the identities of its members in order to protect those members from economic or governmental reprisal.

4. FEF's members include companies identified on the PCAOB's List of Issuers with No Outstanding Past-Due Share of the Accounting Support Fee and the PCAOB's list of Registered Public Accounting Firms.

5. Beckstead & Watts, LLP, is a member of FEF.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 21, 2006

/s/ James Terry
James Terry

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
JUL 27 2009
OFFICE OF THE CLERK

No. 08-861

IN THE
Supreme Court of the United States

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,

Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether the Sarbanes-Oxley Act of 2002 violates the Constitution's separation of powers by vesting members of the Public Company Accounting Oversight Board ("PCAOB") with far-reaching executive power while completely stripping the President of all authority to appoint or remove those members or otherwise supervise or control their exercise of that power, or whether, as the court of appeals held, the Act is constitutional because Congress can restrict the President's removal authority in any way it "deems best for the public interest."

2. Whether the court of appeals erred in holding that, under the Appointments Clause, PCAOB members are "inferior officers" directed and supervised by the Securities and Exchange Commission ("SEC"), where the SEC lacks any authority to supervise those members personally, to remove the members for any policy-related reason or to influence the members' key investigative functions, merely because the SEC may review some of the members' work product.

3. If PCAOB members are inferior officers, whether the Act's provision for their appointment by the SEC violates the Appointments Clause either because the SEC is not a "Department" under *Freytag v. Commissioner*, 501 U.S. 868 (1991), or because the five commissioners, acting collectively, are not the "Head" of the SEC.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding below are those identified in the caption of the case, along with defendant-appellee Board members Bill Gradison, Daniel L. Goelzer and Charles D. Niemeier in their official capacities. Former Board member Kayla J. Gillan was a defendant-appellee in her official capacity until being dismissed from the case by stipulation of the parties upon the conclusion of her service to the Board.

Petitioner Free Enterprise Fund has no parent corporation and no publicly held corporation has a 10% or greater ownership interest in Free Enterprise Fund.

Petitioner Beckstead and Watts, LLP, has no parent corporation and no publicly held corporation has a 10% or greater ownership interest in Beckstead and Watts, LLP.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-104a) is reported at 537 F.3d 667. The opinion of the district court (Pet. App. 106a-117a) is unreported but available electronically at 2007 WL 891675.

JURISDICTION

The court of appeals entered judgment on August 22, 2008, and denied rehearing and rehearing en banc on November 17, 2008. The petition for a writ of certiorari was filed on January 5, 2009, and granted on May 18, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified, in pertinent part, at 15 U.S.C. §§ 7201-7219) (Pet. App. 118a-169a) and the Appointments Clause of the Constitution (Pet. App. 183a).

STATEMENT OF THE CASE

1. Congress passed the Sarbanes-Oxley Act ("SOX" or "Act") in reaction to high-profile accounting scandals involving Enron and other companies. Pet. App. 6a. The Act subjects accounting firms that audit public companies to the broad regulatory authority of the Public Company Accounting Oversight Board ("PCAOB" or "Board"), a new organization specifically designed to be free from any and all political influence (Pet. App. 34a)—including that of both the President and the already

independent Securities and Exchange Commission ("SEC").

Though declaring that the Board shall not be deemed part of the federal government, and its members and employees not deemed federal officers, SOX § 101(b), 15 U.S.C. § 7211(b), the Act delegates to the Board "massive ... unchecked power, by design." 148 Cong. Rec. 12,112, 12,119 (2002) (statement of Sen. Gramm). The Board exercises this authority through five members serving staggered five-year terms. SOX § 101(e), 15 U.S.C. § 7211(e). These members are *not* appointed or removable by the President, but by a majority vote of the SEC. SOX § 101(e)(4), (6), 15 U.S.C. §§ 7211(e)(4), (6).

The Act permanently vests the Board with broad regulatory and enforcement authority over all accounting firms that audit publicly traded companies, including "broad powers to inspect th[os]e ... firms ..., set rules and standards for such audits, and impose meaningful sanctions if warranted." U.S. Gen. Accounting Office, No. GAO-03-339, *Securities and Exchange Commission: Actions Needed to Improve Public Company Accounting Oversight Board Selection Process* 1 (2002) ("*GAO Report*"). Among other things, the Act authorizes the Board to:

- promulgate rules, including professional standards, "as may be necessary or appropriate in the public interest or for the protection of investors," SOX § 103(a)(1), 15 U.S.C. § 7213(a)(1), the willful violation of which constitutes a felony criminal offense, *see* Securities Exchange Act of 1934

("Exchange Act") § 32(a), 15 U.S.C. § 78ff(a) (made applicable by SOX § 3(b), 15 U.S.C. § 7202(b));

- conduct a "continuing program of inspections" involving selective inspection and review of an accounting firm's audit engagements, SOX § 104(a), (d), 15 U.S.C. § 7214(a), (d);
- conduct a formal investigation of any act by a regulated accounting firm that "may violate" the Act, Board rules, securities laws or professional standards, SOX § 105(b)(1), 15 U.S.C. § 7215(b)(1), and impose severe sanctions for violations "as it determines appropriate," SOX § 105(c)(4), 15 U.S.C. § 7215(c)(4); and
- set its own budget and its own members' salaries—currently $673,000 for the Chairman and $547,000 for each of the other members, *see* Ian Katz, *Sarbanes-Oxley Auditing Board Chairman Olson Resigns*, Bloomberg.com, June 8, 2009—funded through a tax that it levies on public companies, SOX § 109(b)-(d), 15 U.S.C. § 7219(b)-(d).

The Act gives the President absolutely no oversight over the Board and its members, through the power of removal or otherwise. And while the Act provides for limited review by the independent SEC of Board rulemaking and sanctions, it imposes numerous constraints on the SEC's ability to exercise any

meaningful oversight over the Board's members. Thus:

- the Act allows the SEC to remove a Board member only after notice and a hearing, and then only if the member (i) "has willfully violated any provision of th[e] Act, the rules of the Board, or the securities laws," (ii) "has willfully abused [his] authority," or (iii) "without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard," SOX §§ 101(e)(6) & 107(d)(3), 15 U.S.C. §§ 7211(e)(6) & 7217(d)(3);
- the SEC exercises no control over the conduct of the Board's regular inspections, including the Board's choices about which firms to investigate, SOX § 105(b)(1), 15 U.S.C. § 7215(b)(1), and the manner and scope of its review, SOX § 105(b)(2), 15 U.S.C. § 7215(b)(2);
- the SEC has no authority to direct Board members to investigate or impose sanctions on the target of an investigation; instead, SEC review occurs only if the Board opts for sanctions, at which point the SEC may modify or cancel the sanctions only if it makes specific statutory findings after notice and a hearing, SOX § 107(c)(2)-(3), 15 U.S.C. § 7217(c)(2)-(3);
- the SEC is *required to* ("shall") approve a proposed Board rule, "if it finds that the rule is consistent with the requirements of th[e]

Act and the securities laws, *or* is necessary or appropriate in the public interest or for the protection of investors," SOX § 107(b)(3), 15 U.S.C. § 7217(b)(3) (emphasis added), and may "abrogate, add to, and delete" Board rules only through notice-and-comment rulemaking, Exchange Act § 19(c), 15 U.S.C. § 78s(c) (made applicable by SOX § 107(b)(5), 15 U.S.C. § 7217(b)(5)); and

- the Act allows the SEC to "censure or impose limitations upon the activities, functions, and operations of the Board," only if—"*after notice and opportunity for a hearing*"—it finds on the record that the Board (i) "has violated or is unable to comply with any provision of th[e] Act, the rules of the Board, or the securities laws" or (ii) "without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard," SOX § 107(d)(2), 15 U.S.C. § 7217(d)(2) (emphasis added).

2. Petitioners Beckstead and Watts, an accounting firm subject to and injured by the Board's regulations, inspections and investigations, and Free Enterprise Fund, an organization with members subject to the Board's authority, sought a declaratory judgment that the provisions of the Act establishing the Board are unconstitutional and an injunction prohibiting the Board and its members from exercising their powers. JA 45-73, 76-77.

The district court entered summary judgment in favor of Respondents. Pet. App. 112a-117a. By a 2-1 decision, the court of appeals affirmed, finding no violation of the Appointments Clause or separation of powers. On the former point, the panel held that Board members are inferior officers who may be appointed by the SEC because the SEC is a "Department" of which its five commissioners, acting collectively, are the "Head." Pet. App. 11a-25a. On the latter point, the panel held that in the case of inferior officers, "Congress 'may limit and restrict the power of removal as it deems best for the public interest.'" Pet. App. 36a (quoting *United States v. Perkins*, 116 U.S. 483, 485 (1886)).

Judge Kavanaugh dissented. He concluded that the Act violates separation of powers because its "unique and apparently unprecedented double for-cause removal [provisions] — an independent agency whose heads are removable for cause only by another independent agency — overruns the boundaries set by Supreme Court precedents in *Humphrey's Executor* and *Morrison* with respect to congressional encroachment on Presidential removal authority." Pet. App. 80a. He also concluded that the Act violates the Appointments Clause because its restrictions on the SEC's ability to remove Board members, coupled with the lack of any other method for the SEC to manage the Board's inspections and investigations, renders Board members principal officers who must be appointed by the President with Senate confirmation. Pet. App. 90a-97a. The full circuit, voting 5-4, denied rehearing en banc. Pet. App. 1a.

SUMMARY OF ARGUMENT

Separation of powers protects the liberty and security of the people by denying the legislature a role in the enforcement of the laws it enacts and ensuring that each branch is identifiably responsible for its actions and hence accountable to the people. In vesting the executive power in a single President, the Framers sought to ensure accountability at the ballot box and the ability to resist legislative encroachments on execution. Congress thus violates separation of powers when it undermines the authority and independence of the President by reassigning or splintering his executive power. Such splintering increases Congress' power (thereby creating risks of legislative tyranny) and obliterates public accountability by bestowing government power on politically immune officers.

Congress' creation of a novel "Fifth Branch" agency, the PCAOB, to regulate the accounting profession violates these fundamental principles for at least three reasons. First, by vesting the power to appoint, remove and review the work of Board members in the SEC—an independent agency insulated from Presidential oversight—the Act completely and "impermissibly burdens the President's power to control or supervise ... executive official[s]." *Morrison v. Olson*, 487 U.S. 654, 692 (1988). Second, the Act unconstitutionally enhances Congress' powers because (1) the SEC that supposedly supervises the Board is subject to congressional influence, (2) the Board itself is likely more subservient to congressional than to

Presidential direction, and (3) any hypothetical Presidential effort to remove a Board member can be trumped by the Senate. Third, Congress had no overriding need or even legitimate reason to upset the Constitution's balance of powers; the *only* reason for not authorizing Presidential appointment and removal, as is done with *every* other independent agency, was Congress' gratuitous desire to reduce "the level of Presidential control" that the Executive exercises over traditional independent agencies. Pet. App. 34a.

The Act also violates the Appointments Clause, which exists to ensure that the politically accountable President will be responsible for appointments and that no important officer will be appointed without the check of Senate confirmation. Because they exercise widespread, unsupervised governmental power, Board members are principal officers who must be appointed by the President with the Senate's advice and consent. Even assuming Board members are inferior officers whose appointments could be vested in the "Head" of a "Department," their appointment by majority vote of the SEC is still unconstitutional: independent agencies are not "Departments" because their commissioners are not directly answerable to the President, and the "Head" of the SEC is its Chairman, not its five Commissioners.

ARGUMENT

The Public Company Accounting Oversight Board exercises, on a permanent basis, broad and coercive governmental power. It controls an essential feature

of the national economy by prescribing corporate auditing standards (in regulations having the force of criminal law) and conducts burdensome investigations concerning accountants' business activities. Uniquely among government agencies, the Board funds its own operations by levying a tax on public corporations.

The *raison d'être* of the Constitution was, of course, to control and check the sort of power that the Board exercises over the citizenry. The Constitution does this by separating the legislative from the executive power and by ensuring that the citizenry may correct through the ballot box any improvident or ineffective exercise of that power, or of the power to appoint important officers.

In the Act, Congress sought to completely circumvent these basic controls on governmental power, and the accountability of elected representatives for the use of such power, by, for the first time in our Nation's history, vesting this potentially tyrannical authority in a purportedly *private* "corporation" whose members are *not* "officer[s] ... or agent[s of] the Federal Government." SOX § 101(b), 15 U.S.C. § 7211(b).[1] Thus, in one fell swoop, Congress relieved itself of the potentially

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[1] Notwithstanding these statutory designations, Respondents have never disputed that the Board is a government actor for constitutional purposes, *see Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995), or that its members are federal officers exercising executive power, *see Bowsher v. Synar*, 478 U.S. 714, 732-33 (1986); *Buckley v. Valeo*, 424 U.S. 1, 137-40 (1976) (per curiam).

controversial responsibility to tax and spend the citizens' money and "advise and consent" to the appointment of principal officers.

Worse still, Congress ensured that the citizenry cannot hold the President accountable for Board missteps by stripping him of any power over (and therefore responsibility for) this "private" entity modeled after the New York Stock Exchange. But Article II vests all of the "executive power," as well as the exclusive power to appoint principal officers, in a democratically elected President precisely to ensure both that the people can easily identify and correct any misuses of this power and that such execution is free from congressional influence because conducted by a President with his own constitutional prerogatives and national constituency.

In short, by making the Board "independent" of both the legislature's budget responsibilities and the President's duty to execute the laws, Congress has bestowed on itself power without responsibility and denied the people any ability to correct improvident law enforcement. Since *no* elected representative is involved in appointing or removing Board members, or reviewing the Board's budget, taxation or enforcement policies, no amount of public disapproval can be converted into replacing Board members or reforming any misguided policies. The Act's gratuitous and unprecedented effort to immunize government power from public accountability, by creating a "Fifth Branch" of government neither appointed nor removable by the President, therefore violates every basic precept of separated powers.

I. THE ACT VIOLATES SEPARATION OF POWERS BY INSULATING THE BOARD FROM PRESIDENTIAL SUPERVISION AND CONTROL

A. Separation of Powers Secures Liberty

"[I]f there is a principle in our Constitution ... more sacred than another, it is that which separates the Legislative, Executive and Judicial powers." 1 Annals of Cong. 581 (Joseph Gales ed., 1834) (remarks of Madison); *see also Buckley*, 424 U.S. at 119 ("separation of powers ... is at the heart of our Constitution"); *Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("Madison, in writing about the principle of separated powers, said: 'No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.'" (quoting *The Federalist No. 47*, at 324 (Jacob E. Cooke ed., 1961))).

It is a civics class truism that the "Constitution sought to divide the delegated powers ... into three defined categories, legislative, executive and judicial." *INS v. Chadha*, 462 U.S. 919, 951 (1983); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 224 (1995) ("[t]he necessity of a distinct and separate existence of the three great departments of government ... had been proclaimed and enforced by ... Blackstone, Jefferson and Madison, and had been sanctioned by the people of the United States" (internal quotation marks omitted; ellipses in *Plaut*)).

The reason "the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers

recognized by the Framers as inherently distinct," was "[t]o ensure against ... tyranny." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982) (plurality). Thus, the "separation of governmental powers into three coordinated Branches is essential to the preservation of liberty." *Mistretta*, 488 U.S. at 380; *see also Loving v. United States*, 517 U.S. 748, 756 (1996) ("[e]ven before the birth of this country, separation of powers was known to be a defense against tyranny"); *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("*MWAA*") ("[t]he ultimate purpose of this separation of powers is to protect the liberty and security of the governed"); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in the judgment) ("[w]hen structure fails, liberty is always in peril"); *Bowsher*, 478 U.S. at 730 ("[t]he Framers recognized that ... structural protections against abuse of power [are] critical to preserving liberty").

Creating separate and distinct governmental powers protects the liberty of the sovereign people in two related ways. First, it prevents the legislature or its agents from exercising executive (or judicial) power, because "'there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.'" *Bowsher*, 478 U.S. at 722 (quoting *The Federalist No. 47*, at 325 (Madison)). Second, segregating governmental powers protects citizens' liberty by ensuring that the potentially tyrannical government is controlled by the sovereign populace, rather than vice versa. Specifically, by establishing an "Executive Branch"

that is "separate and wholly independent" from the "vigorous Legislative Branch," the Framers ensured that "each branch [is] responsible ultimately to the people." *Id.*; *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819) ("[t]he government of the Union, then ..., is, emphatically and truly, a government of the people").

The people can remain sovereign only if they know which branch to hold responsible for unpopular or ineffective government action and policies, and only if they are able to correct those problems through periodic elections. Consequently, like the Framers, this Court has repeatedly emphasized that the purpose of separation of powers is to "ensure that those who wield[]" potentially tyrannical government power are "accountable to political force and the will of the people." *Freytag v. Comm'r*, 501 U.S. 868, 884 (1991). "By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable," because it "allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance." *Loving*, 517 U.S. at 757-58.

Accordingly, as the plain text of Article II makes clear, the Framers vested "'the executive power'" in a single "'President, subject only to the exceptions and qualifications, which are expressed in the instrument,'" *Myers v. United States*, 272 U.S. 52, 138-39 (1926) (quoting 7 *Works of Hamilton* 80-81 (John C. Hamilton ed., 1851)), so the people would

know who is responsible for executing the laws (and other executive tasks) and would be able to overturn unpopular execution through the ballot box. Thus, the "insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known." *Printz v. United States*, 521 U.S. 898, 922 (1997).

Indeed, for this reason, the Framers rejected any notion of a plural Executive, or even a Privy Council to advise the President,[2] because it was well understood that "unity may be destroyed ... by vesting [power] ostensibly in one man, subject in whole or in part to the controul and co-operation of others." *The Federalist No. 70*, at 472-73 (Hamilton). If the executive power were not placed in a "single hand," then "the people" would be "deprived ... of the two greatest securities they can have for the faithful exercise of any delegated power"—"the restraints of public opinion" and the "opportunity of discovering with facility and clearness the misconduct of the persons they trust." *Id.* at 472, 477-78; *see also Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in judgment) ("[t]he Founders ... consciously decid[ed] to vest Executive authority in one person rather than several" "in order to focus ... Executive responsibility thereby facilitating accountability"); *Bowsher*, 478 U.S. at 738 n.1

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[2] The Convention rejected Edmund Randolph's proposal that the Executive consist of three members drawn from separate regions of the country, 1 *The Records of the Federal Convention of 1787*, at 66, 71-74, 88, 91-92, 97 (Max Farrand ed., 1st ed. 1911), and also rejected proposals for the President to have a Privy Council, 2 *id.* at 335-337, 533, 537, 542.

(Stevens, J., concurring in the judgment) ("'If there be one principle clearer than another, it is this: that in any business, whether of government or of mere merchandising, *somebody must be trusted*, in order that when things go wrong it may be quite plain who should be punished.... *Power and strict accountability of its use* are the essential constituents of good government.'" (quoting Woodrow Wilson, *Congressional Government: A Study in American Politics* 186-87 (Meridian Books 1956) (1885))); 1 *The Works of James Wilson* 443 (Bird Wilson ed., 1804) ("In the United States, our first executive magistrate is not obnubilated behind the mysterious obscurity of counsellors.... He is the dignified, but accountable magistrate of a free and great people.").

Finally, the Framers and this Court have been equally explicit about the greatest threat to those separated powers and liberty: Congress. As the Court has often noted, the "constitutional system of checks and balances is designed to guard against 'encroachment or aggrandizement' by Congress at the expense of the other branches of government." *N. Pipeline*, 458 U.S. at 83 (plurality) (quoting *Buckley*, 424 U.S. at 122). This is because, "'[i]n republican government the legislative authority, necessarily, predominates,'" since, *inter alia*, only it can pass laws that interfere with the Constitution's scheme. *Mistretta*, 488 U.S. at 382 n.12 (quoting *The Federalist No. 51*, at 350 (Madison)); *accord Chadha*, 462 U.S. at 950. And, as a matter of practical experience, the "'legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex.'" *Plaut*,

514 U.S. at 221 (quoting *The Federalist No. 48*, at 333 (Madison)). The "debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." *Buckley*, 424 U.S. at 129. Of particular relevance here, the "dangers of congressional usurpation of Executive Branch functions have long been recognized." *Bowsher*, 478 U.S. at 727. Accordingly, as the Court recently noted, the judiciary has a particular "duty" to act "'as the bulwar[k] of a limited constitution against legislative encroachments.'" *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009) (quoting *The Federalist No. 78*, at 526 (Hamilton) (alteration in *Nw. Austin*)).

Thus, while the Court has not required "hermetic division among the Branches," *Mistretta*, 488 U.S. at 381, it has emphasized that "separation of powers is" "a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut*, 514 U.S. at 239; *see also id.* at 240 ("Separation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors."). Again, this is especially true with respect to the legislature because, "[a]s James Madison presciently observed," Congress will continually seek to "'mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate

departments.'" *MWAA*, 501 U.S. at 277 (quoting *The Federalist No. 48*, at 334).

B. Impeding the President's Ability to Execute the Law Violates Separation of Powers

In light of the foregoing principles, the Court has analyzed separation-of-powers questions in two different ways. First, if Congress is engaging in direct "aggrandizement," where it is "accreting to *itself* judicial or executive power," *Mistretta*, 488 U.S. at 382 (emphasis added), this is *per se* unconstitutional. *See Bowsher*, 478 U.S. at 726-27 ("congressional control over the execution of the laws ... is constitutionally impermissible"); *Chadha*, 462 U.S. at 958-59; *Springer v. Phil. Is.*, 277 U.S. 189, 201 (1928) ("the Legislature cannot exercise either executive or judicial power").

Second, even if the law does not directly aggrandize congressional power by assigning executive or judicial power to a legislative agent, Congress may violate separation of powers if it seeks to "undermine the authority and independence of one or another coordinate Branch." *Mistretta*, 488 U.S. at 382. The Court will thus examine whether the law poses a "danger of either aggrandizement *or encroachment*." *Id.* (emphasis added); *see also id.* ("[i]t is this concern of encroachment and aggrandizement that has ... aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power'" (quoting *Chadha*, 462 U.S. at 951)); *Buckley*, 424 U.S. at 122 ("encroachment or

aggrandizement"); *N. Pipeline*, 458 U.S. at 57-58 (plurality) (same).

Thus, "[e]ven when a branch does not arrogate power to itself, ... the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving*, 517 U.S. at 757. Accordingly, the test for congressional "encroachment" is whether the law "'prevents the Executive Branch from accomplishing its constitutionally assigned functions.'" *Mistretta*, 488 U.S. at 383 (quoting *Nixon v. Adm'r*, 433 U.S. 425, 443 (1977)); *see also Morrison v. Olson*, 487 U.S. 654, 685 (1988) (Congress may not "impermissibly interfere[] with the President's exercise of his constitutionally appointed functions"); *Loving*, 517 U.S. at 757 ("it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another").

The analysis in these cases is "designed ... to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." *Morrison*, 487 U.S. at 689-90. In this regard, the Court will assess the "potential for disruption" of the President's executive prerogatives and whether any negative "impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon v. Adm'r*, 433 U.S. at 443 (citing *United States v. Nixon*, 418 U.S. 683, 711-12 (1974)).

There are two kinds of potential "disruptions" of the President's ability to perform his functions. Congress may erect *obstacles* to the President's own performance—most obviously, by burdening the means through "which the President obtains information necessary to discharge his duty assigned under the Constitution." *Pub. Citizen*, 491 U.S. at 488 (Kennedy, J, concurring in the judgment); *see also Nixon v. Adm'r*, 433 U.S. at 443; *United States v. Nixon*, 418 U.S. at 711-12.

A more direct and dangerous encroachment occurs when Congress seeks to "*reassign* powers vested by the Constitution in either the Judicial Branch or the Executive Branch." *Mistretta*, 488 U.S. at 382 (emphasis added). Reassigning the "judicial" or "executive power" to persons other than those designated by the Constitution to perform those tasks is obviously in stark tension with the "inexorable command" of the Constitution's plain language. *N. Pipeline*, 458 U.S. at 59 (plurality). More generally, such reassignment of executive power both enhances legislative power in a manner analogous to forbidden congressional "aggrandizement" and greatly diminishes the political accountability necessary to secure liberty.

Legislative power is enhanced in two ways. First, even if the executive power is not reassigned to a legislative agent, splintering that power inherently creates a correlative and impermissible enhancement of Congress' power to influence execution of the laws. The Court has repeatedly noted that, "as Madison admonished at the founding," the "Constitution

mandates that 'each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or *indirect*, of either of the others.'" *Mistretta*, 488 U.S. at 380 (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935) (emphasis added; alteration in *Mistretta*)). And, as a majority of the Court emphasized just last Term with respect to even *traditional* independent agencies, placing the power to administer laws in officers who enjoy "freedom from presidential oversight (and protection)" simply results in an "increased subservience to congressional direction." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1815 (2009) (plurality); *see also id.* at 1825 (Stevens, J., dissenting). Indeed, Justice Stevens opined that the legislature's dominance is so profound that an independent agency like the FCC is "better viewed as an agent of Congress." *Id.* at 1825; *see also* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2271 n.93 (2001) ("[a]s a practical matter, successful insulation of administration from the President—even if accomplished in the name of 'independence'—will tend to enhance Congress's own authority over the insulated activities").

Moreover, even if Congress could not *control* an administrative agency free from Presidential influence, simply creating such an entity enhances congressional power because it diminishes the President's power—and thus weakens the "check" needed to "balance" legislative power. *See Bowsher*, 478 U.S. at 722 ("[e]ven a cursory examination of the Constitution reveals the influence of Montesquieu's

thesis that checks and balances were the foundation of a structure of government that would protect liberty"). The whole premise of checks and balances is, of course, that "'[t]he greatest security ... against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others.'" *Mistretta*, 488 U.S. at 381 (quoting *The Federalist No. 51*, at 349 (Madison)); *see also Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("[s]eparation of powers helps to ensure the ability of each branch to be vigorous in asserting its proper authority"). Preventing the President from "administer[ing]" a function within his "department" denies him both the "means" and "motives" to resist congressional encroachment, thus diminishing the "[a]mbition ... counteract[ing] ambition" that was the centerpiece of the Framers' scheme of divided government. *The Federalist No. 51*, at 349 (Madison); *see also Freytag*, 501 U.S. at 907 (Scalia, J., concurring in part and concurring in the judgment) (although President's alter egos "are not themselves able to resist congressional encroachment, they are directly answerable to the President, who is responsible to *his* constituency for their appointments and has the motive and means to assure faithful actions by his direct lieutenants"). Thus, even where, as in *Printz*, an executive function such as administering a federal statute is transferred to sovereign *states* that are neither funded nor controlled by Congress, this "reduction" in the "power

of the President" nevertheless skews the "separation and equilibration of powers" in the legislature's favor, because "Congress [can] act as effectively without the President as with him." 521 U.S. at 922-23.

Even more obviously, such reassignments also obliterate both aspects of public accountability that the Framers intended. First, if laws are administered by entities free from all Presidential control, or which are jointly influenced by Congress and the President, it is far more difficult for citizens to determine who is responsible for the agency's policies. *See Fox Television*, 129 S. Ct. at 1825 (Stevens, J., dissenting) ("[s]trict lines of authority are particularly elusive when Congress and the President both exert a measure of control over an agency").

More important, agencies free from Presidential control are not accountable to the people. Even traditional independent agencies—which are constitutionally compliant because their commissioners are appointed and removable by the President—"are not directly responsible to the voters," or subject to correction through "ballot-box control," because they are "insulate[d] ..., to a degree, from 'the exercise of political oversight'" by the democratically elected President. *Id.* at 1829-30 (Breyer, J., dissenting) (quoting *Freytag*, 501 U.S. at 916 (Scalia, J., concurring in part and concurring in the judgment)); *see also id.* at 1815 (plurality) ("independent agencies are sheltered ... from the President" and have "freedom from presidential oversight"); *Bowsher*, 478 U.S. at 739 (Stevens, J.,

concurring in the judgment) ("[i]t is universally accepted that [FTC commissioners] are independent of, rather than subservient to, the President in performing their official duties"); *Humphrey's Ex'r*, 295 U.S. at 625 (FTC is "independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official"). This led the four dissenting Justices in *Fox Television* to conclude that such politically unresponsive agencies should be subject to special judicial skepticism, 129 S. Ct. at 1830 (Breyer, J., dissenting), and the plurality to note that such "Headless Fourth Branch" agencies create a "separation-of-powers dilemma" because "of the power that Congress has wrested from the unitary Executive," *id.* at 1817 (plurality). This lack of democratic accountability to the sovereign people is obviously greatly exacerbated when an agency's officers are neither appointed nor removable by the President.

Finally, such legislative influence over agencies executing the law makes the government not only less "accountable," but less "effective" and less cognizant of the general public interest. *Loving*, 517 U.S. at 757. This is because the "'President [is] elected by all the people [and] is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local,'" *Chadha*, 462 U.S. at 948 (quoting *Myers*, 272 U.S. at 123), so legislative influence creates the "'effects of faction'" and the "fear that special interests could be favored," *id.* at 948, 950 (quoting *The Federalist No. 73*, at 495 (Hamilton)); *see also*

The Federalist No. 70, at 474 (Hamilton) (a shared executive "might split the community into the most violent and irreconcilable factions, adhering differently to the different individuals who composed the magistracy"). And, of course, legislative influence creates all of the inefficiencies and dissensions inherent in a multi-member body trying to execute a law. *See Loving*, 517 U.S. at 758 (quoting Jefferson's observation that "[n]othing is so embarrassing nor so mischievous in a great assembly as the details of execution").

C. The Act Impermissibly Impedes Presidential Supervision of Executive Functionaries in Order to Enhance Congressional Influence

In light of the foregoing, it is clear that Article II is violated if the "executive power" is vested in a person wholly unconnected to the President. In such circumstances, the President, by definition, cannot exercise "*his* constitutionally appointed functions." *Morrison*, 487 U.S. at 685 (emphasis added). Consequently, when analyzing reassignment of executive power, the precise question is whether the officer vested with the executive function is "control[led]" and "supervis[ed]" by the President. *Id.* at 692.

Since it is obvious that the President "'must execute [the laws] by the assistance of subordinates,'" *Buckley*, 424 U.S. at 135 (quoting *Myers*, 272 U.S. at 117), it is clear that Article II's grant "'to the President [of] the executive power of the government'" includes "'the general administrative control of those executing the laws.'" *Id.* at 136

(quoting *Myers*, 272 U.S. at 163-64). Thus, a congressional limitation on the President's relationship to executive functionaries is improper if it "impermissibly burdens the President's power to control or supervise ... an executive official, in the execution of his or her duties." *Morrison*, 487 U.S. at 692. As indicated above, whether the burden is "impermissibl[e]" depends not only on the extent of the burden, but also on whether Congress' effort was driven by an "overriding need" (*Nixon*, 433 U.S. at 443), or by less justifiable motives.

While the Court's relatively sparse case law has not precisely demarked what constitutes an "impermissible burden on the President's power to control or supervise," this is quite a simple case because (i) the President has *no* ability to control or supervise Board members, (ii) Congress has at least equivalent ability to influence the Board, and (iii) there is no legitimate justification, let alone an "overriding need," for this intrusion.

1. The Act clearly strips the President of all ability to control or supervise Board members. *First*, and most important, unlike with every other independent agency or entity executing federal law, the President is precluded—either directly or through an "alter ego" removable at will—from appointing or removing Board members.[3] Standing alone, this

[3] Congress often vests appointment and removal authority in an Executive Branch department head removable at will by the President, but doing so in no way impedes the President's authority because such a department head is the President's "alter ego" and subject to his unfettered control. *Myers*, 272 U.S. at 133; *see also In re Sealed Case*, 838 F.2d 476, 528 n.30

violates Article II since "'the general administrative control of those executing the laws'" necessarily "'include[s] the power of appointment and removal of executive officers.'" *Buckley*, 424 U.S. at 136 (quoting *Myers*, 272 U.S. at 164); *see also* 1 Annals of Cong. 463 (remarks of Madison) ("I conceive that if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws."). Since it is not possible to "control or supervise" an official whom one can neither appoint nor remove, Congress' decision to strip the President of both of these essential tools necessarily means that the Act "sufficiently deprives the President of control over the [officer] to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws." *Morrison*, 487 U.S. at 692-93.

(continued...)

(D.C. Cir. 1988) (R.B. Ginsburg, J., dissenting) ("[t]he difference [between vesting removal power in the President and in the Attorney General] is not significant, since the Attorney General 'is the hand of the President'" (quoting *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922))), *rev'd sub nom. Morrison*, 487 U.S. 654. It is therefore quite simple for the President to remove an officer "through" a department head: he simply "order[s]" his alter ego to effectuate the removal, "and can fire the [department head] if he refuses to" do so. *Nat'l Treasury Employees Union v. Reagan*, 663 F.2d 239, 247-48 (D.C. Cir. 1981). In this case, however, Congress has vested appointment and removal authority in the SEC, an independent agency that "cannot in any proper sense be characterized as an arm or an eye of the executive." *Humphrey's Ex'r*, 295 U.S. at 628; *see also supra* pp. 22-23; *infra* pp. 35-38.

While appointment is obviously very important, *see Buckley*, 424 U.S. at 124-37, removal is key because "[o]nce an officer is appointed, it is only the authority that can remove him ... that he must fear and, in the performance of his functions, obey." *Bowsher*, 478 U.S. at 726 (internal quotation marks omitted); *see also Edmond v. United States*, 520 U.S. 651, 664 (1997) ("[t]he power to remove officers ... is a powerful tool for control"). As Madison explained, "[i]f the *President* should possess *alone* the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Cong. 499 (emphasis added), *quoted in Myers*, 272 U.S. at 131. Accordingly, "the President's power to remove Executive officers ... is ... a necessary part of the grant of the 'executive Power.'" *Pub. Citizen*, 491 U.S. at 484 (Kennedy, J., concurring in the judgment); *see also Common Legislative Encroachments on Executive Branch Authority*, 13 Op. Off. Legal Counsel 248, 252 (1989) ("restrictions on removal power strike at the heart of the President's power to direct the executive branch and perform his constitutional duties").

The famous Decision of 1789 eliminates any doubt about the President's constitutional prerogative to remove executive officers. There, "the First Congress, after heated debate, deleted from a proposed bill creating the Department of Foreign Affairs language which provided that the Secretary of

Foreign Affairs was 'to be removable from office by the President.'" *Synar v. United States*, 626 F. Supp. 1374, 1395 (D.D.C. 1986) (three-judge district court), *aff'd sub nom. Bowsher*, 478 U.S. 714. It did so out of fear that "the original text implied"—wrongly—"the absence of a constitutionally conferred power of the President to effect the removal." *Id.*; *see also Myers*, 272 U.S. at 112-15. But the President's "duty to see the laws faithfully executed" was intended to encompass "that species of power which is necessary to accomplish that end," including the broad power of removal. 1 Annals of Cong. 496 (remarks of Madison). This removal power was vital to preserve "'that great principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good.'" *Myers*, 272 U.S. at 131 (quoting 1 Annals of Cong. 499 (remarks of Madison)). "Madison's position ultimately prevailed" in the First Congress. *Bowsher*, 478 U.S. at 723.

"This 'Decision of 1789' provides contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument," *id.* at 723-24 (internal quotation marks omitted), and is "recognized" as "settl[ing] the [Presidential removal] question beyond any power of alteration," *Parsons v. United States*, 167 U.S. 324, 330 (1897). The "construction of the constitution ... as given by the congress of 1789" laid the foundation for the "constant and uniform practice of the government in harmony with such construction." *Id.* at 339; *see also Myers*, 272 U.S. at 136-48.

Second, Congress systematically eliminated every other means of Presidential control or influence over the Board. The President has no power to review the Board's work product since he cannot direct the independent SEC how to exercise the discretionary oversight function (whatever its scope) that Congress assigned to that agency. The President is likewise denied any direct or indirect influence over the Board's finances. The Board raises its own money outside of the congressional appropriations process through direct taxation of registered corporations, *see* SOX § 109, 15 U.S.C. § 7219, and the President has no power to review the Board's budget, including members' enormous salaries. Consequently, the President is deprived of the "additional levers of influence" that he has over traditional independent agencies, such as lending his "'presidential good will' to obtain budgetary and legislative support" or using his "administrative tools" such as "centralization of ... personnel requirements." Pet. App. 28a-29a.

Third, Congress was vigilant in depriving the President of any ability to influence the Board *through* the SEC. As the opinion below correctly notes, the SEC Chairman "dominate[s] commission policymaking," "directs the administrative side of commission business" and "command[s] staff loyalties." Pet. App. 28a-29a (internal quotation marks omitted; alterations in panel opinion); *see also infra* pp. 61-62. The Chairman, in turn, is somewhat beholden to the President because he serves as Chairman "at the pleasure of the President." Pet. App. 33a. Apparently recognizing this, Congress denied the Chairman his traditional statutory

authority to "appoint and supervise personnel" (Pet. App. 25a) by vesting appointment of Board members in the entire Commission, a bipartisan body with fixed terms that is much less subject to Presidential influence. SOX § 101(e)(4), 15 U.S.C. § 7211(e)(4). More important, Congress made sure that the SEC would not be able to impose its policy views on Board members by affirmatively precluding the Commission from removing members for any policy-related reason and permitting removal only for "*willful[]*" law violations or "abuse[s]" or for "fail[ing] to enforce compliance" with the Act absent "reasonable ... excuse." SOX § 107(d)(3), 15 U.S.C. § 7217(d)(3) (emphasis added). Thus, whatever indirect influence the President has over SEC Commissioners and policy cannot be transformed into influence over Board members.

In short, Congress has thoroughly plugged each and every potential avenue by which the President could hope to even indirectly control or influence the Board.

2. Worse still, it seems clear that Congress' influence over the Board is at least equal to, and quite probably greater than, that of the President. Respondents have repeatedly claimed that the SEC "directs and supervises" Board members because it allegedly can transfer the Board's functions and the threat of so doing is "functionally equivalent to removal power." Board Br. in Opp. 28; *see also* U.S. Br. in Opp. 17-18; Pet. App. 12a-14a. While this is, in fact, not true of the SEC (and in any event does not constitute "supervision" for Appointments Clause

purposes, *see infra* pp. 55-56), it most assuredly is true of Congress. Unlike the SEC, Congress can reassign the Board's functions to the SEC, terminate the agency and deprive it of funding. Most obviously, Congress could reduce the Board's enormous salaries by imposing a 75% pay cut, so that members make the same amount as SEC Commissioners and Cabinet officers. *See infra* pp. 49-50.

More directly, and much more importantly, Congress has veto power over any Board member's removal, the critical tool for controlling official performance. The only way the President can even try to remove a Board member is to direct a majority of SEC Commissioners to do so. Even under the Board's own analysis, the President can enforce that directive to a recalcitrant Commissioner only if the Commissioner has a "duty" to fire the Board member, such that the failure to do so is a "neglect of duty" justifying Presidential removal of the Commissioner. Board Br. in Opp. 24-26; *see also MFS Sec. Corp. v. SEC*, 380 F.3d 611, 619 (2d Cir. 2004) (Commissioners removable for "'inefficiency, neglect of duty or malfeasance in office'" (quoting *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988))). (Significantly, in contrast to the Board, the President and the SEC have not contended in this Court or below that the President has *any* power under any circumstances to direct Commissioners on their discretionary decision to fire a Board member.) But even if the President could remove a Commissioner for failing to fire a Board member, this would still not cause removal of the *member* because there is no next-in-line or "acting" Commissioner to

carry out the President's removal directive. *See* 5 U.S.C. § 3349c. To accomplish that desired goal, the President would have to remove all the recalcitrant Commissioners and nominate new ones. But the Senate would then have to *confirm* such replacement Commissioners.

Accordingly, Presidential removal of a Board member necessarily requires the "advice and consent of the Senate." There is no functional difference between directly requiring the President to secure the Senate's advice and consent to remove the Board member and requiring the President to secure the Senate's advice and consent to have in place officers willing to remove the Board member. Thus, the Senate's involvement in the removal of Board members is functionally indistinguishable from the removal scheme struck down by the square holding of *Myers*—which invalidated "a federal statute by which certain postmasters of the United States could be removed by the President only 'by and with the advice and consent of the Senate.'" *Morrison*, 487 U.S. at 686 (quoting *Myers*, 272 U.S. at 107). As the *Morrison* Court emphasized, "Congress' attempt to involve itself in the removal of an executive official was found to be sufficient grounds to render the statute invalid." *Id.* The "essence of the decision in *Myers* was the judgment that the Constitution prevents Congress from 'draw[ing] to itself ... the right to participate in the exercise of that [removal] power.'" *Id.* (quoting *Myers*, 272 U.S. at 161; first alteration in *Morrison*). Thus, Congress' participation in the Board member's removal is,

standing alone, "sufficient grounds" to "render the statute invalid."[4]

In short, on the one hand, Congress has plenary authority over Board members' continued employment and salaries and the Board's very existence, exerts substantial influence over the SEC that allegedly supervises the Board, and can prevent the President from succeeding in any effort to indirectly remove a Board member. On the other hand, the President concededly has no power to influence the Board's appointments, budget, work product or existence, and any theoretical power to effectuate removal can be trumped by the Senate (or by a lawsuit by an SEC Commissioner contesting the President's power to direct the Board member's removal). In these circumstances, no neutral analysis would suggest that a Board member has more reason to "fear and ... obey" the President than

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[4] This case is actually *worse* than *Myers* because the Senate's acquiescence in confirming the replacement Commissioners would not result in the removal of the Board member the President wants to fire—it would only be the first, speculative step toward such removal. This is because the Board member is entitled to a full hearing before the replacement Commissioners could finally remove him. SOX § 107(d)(3), 15 U.S.C. § 7217(d)(3). This means both that the replacement Commissioners would have to remain neutral on the Board member's removal during the confirmation process (or else disqualify themselves from participating in the removal hearing because they prejudged its outcome, *see Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263 (2009); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)), and that, in all events, removal could only occur after the uncertainty and delay inherent in an impartial hearing.

he would have to fear and obey Congress. *Bowsher*, 478 U.S. at 726 (internal quotation marks omitted).

Accordingly, the Act not only completely prevents the President from performing his duty to execute the laws, it directly and tangibly involves the legislature in enforcing the laws it passes—the central tyrannical evil that separation of powers was most directly designed to prevent. This is in stark contrast to *Morrison*, where Congress had no cognizable influence over the independent counsel or her removal.

3. Finally, with respect to the other factor assessed in the calculus—whether Congress had an "overriding need" for the intrusion, *Nixon*, 433 U.S. at 443—it is quite clear that Congress' complete separation of the Board from the President was wholly gratuitous and motivated by nothing other than the improper "intention," as the court below put it, to reduce "the level of Presidential control over the Board." Pet. App. 34a. Throughout this litigation, Respondents have been wholly unable to explain why the Board's power could not be vested in the SEC, as was proposed, *see, e.g.*, H.R. 5184, 107th Cong. (2002); S. 2056, 107th Cong. (2002), or exercised by officials appointed and removable by the President, as with every other independent agency. The reason for this deafening silence is that Congress engaged in this unprecedented scheme solely to create *more* "freedom from [the P]resident[]" and "subservience to [C]ongress[]" than that possessed by traditional independent agencies. *Fox Television*, 129 S. Ct. at 1815 (plurality), which is why the Board was

expressly modeled after private organizations like the New York Stock Exchange, *see* Pet. App. 35a n.13; SOX § 107(a), 15 U.S.C. § 7217(a), over which the President obviously has *no* supervisory influence or control.

Thus, this is "insulation" from the President for its own sake, confirming that the Board's "massive power" was "unchecked ... *by design*." 148 Cong. Rec. at 12,119 (emphasis added). This is, again, in stark contrast to *Morrison*, where the independent counsel was obviously needed to avoid the inherent "conflicts of interest ... [created] when the Executive Branch is called upon to investigate its own high-ranking officers." 487 U.S. at 677. Surely Congress cannot be allowed to suck execution of the law into its "impetuous vortex," *Plaut*, 514 U.S. at 221 (internal quotation marks omitted), and dispose of the democratic accountability necessary to secure liberty, if it cannot even *articulate* some *reason* for rearranging the Framers' carefully calibrated scheme (or departing from the independent-agency model that presses the outer limits of that scheme).

II. RESPONDENTS' DEFENSES OF THE ACT LACK MERIT

A. The SEC's Purported Control Over the Board Cannot Cure the President's Deprivation

Respondents' principal defense of this unprecedented usurpation of executive power is that the *SEC* has the power to appoint and (in extraordinarily narrow circumstances) remove Board members and to supervise their work product. Thus,

according to Respondents' bewildering reasoning, the *President's* power to appoint, remove, control and supervise officers exercising *his* "executive power" is somehow satisfied because an agency that is "free[] from presidential oversight" and "subservien[t] to" (or even "an agent of") Congress can engage in such oversight. *Fox Television*, 129 S. Ct. at 1815-16 (plurality); *id.* at 1825 (Stevens, J., dissenting). This is not much different than arguing that the President's ability to exercise the executive power would not be diminished if Congress had authorized the federal *judiciary* to oversee the Board's members and work product. The fact that judges could control the Board would obviously not cure stripping the President of his power because the judges, although appointed by the President, make decisions independent of his wishes. While the judiciary is obviously more independent of the President than is the SEC, it is also obviously far more independent of Congress than is the SEC—so it is truly not clear whether vesting this oversight power in the SEC is less threatening to separation of powers than vesting it in the judiciary.

Indeed, the Court has noted that the "Executive Branch's involvement in the [Sentencing] Commission"—an "independent commission in the *judicial* branch" where three of the seven Commissioners are sitting federal judges, 28 U.S.C. § 991(a) (emphasis added)—"is *greater* than in other independent agencies, such as the *Securities and Exchange Commission*." *Mistretta*, 488 U.S. at 368, 387 n.14 (emphasis added). But transferring the Justice Department's entire Criminal Division to a

"Criminal Prosecution Board" (identical to the Board here) obviously could not be cured by having that Board "supervised" by the Sentencing Commission, just as the SEC's allegedly pervasive supervision of the Board cannot possibly cure the Presidential deprivation here.

As this example illustrates, when the various components of Respondents' piecemeal defense are put together, they plainly authorize a regime in which the President has no influence over how the laws are executed or other executive powers are performed. If, as Respondents contend, the SEC's supervision of the Board is as constitutionally acceptable as the President's or a cabinet official's supervision of inferior Executive Branch officers, this necessarily means that all the functions currently performed by such lower-level Executive Branch officers may be transferred to entities identical to the Board and that the supervisory functions of the cabinet officers may be transferred to independent agencies like the SEC. Thus, with respect to *every* executive Department, from State to Justice, Congress may vest performance of these executive functions in a "corporation" modeled after the New York Stock Exchange and have them overseen by bipartisan commissioners serving fixed terms who are independent of Presidential oversight. Neither Respondent has even offered any hint as to why the arrangement defended here would be at all problematical in any other context, including criminal law enforcement or foreign and military affairs. And any such "limitation" would require the Court to rank-order those "core" executive functions

that cannot be given to Board-like entities—precisely the sort of amorphous and *ad hoc* "function[al]" limitation that the Court eschewed in *Morrison*. *See* 487 U.S. at 688-91.

Upholding the Board here would therefore plainly authorize Congress to reduce the President to the largely symbolic and hortatory role of appointing bipartisan independent commissioners who, in turn, would appoint independent board members who do the actual governing but could not be removed or supervised by the President in any circumstance, and where any indirect removal effort would necessarily involve the Senate's participation. This arrangement cannot reasonably be squared with the Constitution's plain language and is precisely the unaccountable plural executive that the Framers expressly rejected because it would both place the executive under the thumb of Congress and place citizens under the thumb of unelected functionaries. If the Constitution's express vesting of the "executive power" in the President, and the Court's consistent endorsement of the Constitution's liberty-enhancing separated powers, are anything more than meaningless rhetoric, the Act's complete separation of the executive power from the Executive must be patently unconstitutional.

B. The Act Violates *Morrison v. Olson*

Inexplicably, Respondents contend that *Morrison* somehow *supports* the Board's validity. But, as established above, the Board is plainly unconstitutional under the general standard reconfirmed in *Morrison*. Moreover, the Act plainly

flunks *every* aspect of the two specific tests *Morrison* used to apply that general standard, *i.e.*, whether the restriction on Presidential removal "by itself" impermissibly prevents his "control [and] supervision" and, if not, whether the Act, "taken as a whole," does. 487 U.S. at 685, 695.

1. On the threshold question of removal, the Act is facially improper because it "completely strip[s]" the President of removal power, thus ensuring that there are "*no means* for the President to ensure the 'faithful execution' of the laws." *Id.* at 692 (emphasis added). Respondents nonetheless contend that the *President's* removal power is not completely stripped because the *SEC* can remove.

The fatal flaw in this argument has been described above: any even theoretical ability of the President to effectuate a Board member's removal over the objection of the SEC requires Senate confirmation of any replacement Commissioners, thus violating the basic prohibition against Congress "gain[ing] a role in the removal of executive officials." *Id.* at 686. In addition, it is quite doubtful the President could order the SEC to fire Board members at all: removal of Board members is an entirely discretionary act that Commissioners "may" do, SOX § 107(d)(3), 15 U.S.C. § 7217(d)(3), and neither the President nor the SEC has made the unprecedented argument that the President can fire a Commissioner because he disagrees with the Commissioner's exercise of his discretionary powers.

Even accepting the *Board's* view that a Commissioner may be removed if his failure to fire a

Board member constitutes a "neglect of *duty*" (Board Br. in Opp. 26 (emphasis added)), such a "duty" would obviously arise only where the member clearly committed a removable offense. *Cf. Pittston Coal Group v. Sebben*, 488 U.S. 105, 121 (1988). But, since the extraordinarily narrow grounds for removing Board members permit removal only of true miscreants, the only *clear* cases are those where the member has committed a felony (a "willful" law violation) or some extraordinary dereliction tantamount to an impeachable offense. For example, there is clearly no duty to remove a Board member for either egregious *over-enforcement* of the law or for a complete "fail[ure] to enforce" the law if the member had an even arguably "reasonable justification or excuse" for this failure, SOX § 107(d)(3)(C), 15 U.S.C. § 7217(d)(3)(C)—such as a substance abuse problem or family illness.

Accordingly, even under the Board's formulation, the President can require the removal of a Board member only in cases like those where Congress can impeach the member—flagrant abuses of office. Obviously, this provides the President no power to ensure that the laws are exercised in any way remotely consistent with his enforcement or financial policies and provides no implicit "threat" to Board members cognizably different than the threat of impeachment by Congress. If this does not "completely strip" the President of removal authority, it is quite literally difficult to hypothesize what would: there is no non-legislative government entity more independent of the President than the SEC (save for the Judiciary), and, so far as we can discern,

no statute provides narrower removal grounds than those applicable to Board members.

This is in stark contrast to the removal provision in *Morrison*, which made clear that the independent counsel "'may be removed ... for good cause,'" 487 U.S. at 663 (quoting 28 U.S.C. § 596(a)(1)), and also "specifically provide[d]" that the counsel "is to comply to the extent possible with the policies of the [Justice] Department," *id.* at 672. Accordingly, this provision "provide[d] the Executive with substantial ability to ensure that the laws are 'faithfully executed' by an independent counsel" because, among other things, "good cause" would certainly include the counsel's violation of her "statutory responsibilit[y]" to follow the Attorney General's enforcement and other policies. *Id.* at 692, 696; *see also The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 169 n.117 (1996) ("a generous reading of the President's (or a department head's) power to remove [even] an inferior officer for cause may be essential to the constitutionality of removal restrictions concerning even those officers whose functions are narrow"). Here, in contrast, there is no assertion that the President (or even the SEC) can fire Board members for failing to follow the President's (or the SEC's) policies.

2. All the other factors considered in *Morrison* plainly demonstrate that the Act, "taken as a whole," violates the separation of powers. 487 U.S. at 685. First, while the President did not appoint the independent counsel, "[n]o independent counsel

[could] be appointed without a specific request by the Attorney General," which was "committed to his unreviewable discretion," and thus gave "the Executive a degree of control" over whether this executive function was performed at all. *Id.* at 696. The Attorney General also had the power to shape the scope of the independent counsel's authority from the outset because "the jurisdiction of the independent counsel [was] defined with reference to the facts submitted by the Attorney General." *Id.*; *see also id.* at 679.

Relatedly, the President at any point could exercise ultimate control over *all* of the independent counsel's investigative and prosecutorial actions—by *pardoning* those identified individuals the independent counsel was investigating. The President could thus terminate, at any time, any criminal prosecution he deemed ill-advised. Obviously, he has no similar ability to preempt the Board's investigations by immunizing the multitude of actors subject to the Board's broad jurisdiction. In short, the President had the unreviewable discretion to never initiate or to shut down the independent counsel's prosecution—powerful tools for control that are wholly lacking here.

In addition, unlike the independent counsel, who had only "limited jurisdiction and tenure and lack[ed] policymaking or significant administrative authority," *id.* at 691, the Board exercises broad policymaking authority on a permanent basis.

Finally, as noted above, the restriction in *Morrison* was directed at the inherent institutional problem of

Presidential control over prosecuting his own allies, was designed to enhance government accountability to the people by ensuring even-handed enforcement of powerful officers, and was precisely tailored to curing the well-documented problem. *Id.* at 677. Here, the restriction is not aimed at any articulated or plausible concern about Presidential abuses, is designed to *diminish* accountability to the people and any conceivable concern about Presidential bias could be solved by the "less intrusive" alternative of vesting the Board's power in the SEC. *Nixon*, 433 U.S. at 444.

III. THE ACT VIOLATES THE APPOINTMENTS CLAUSE

In addition to violating Article II's general grant of executive power, the Act also violates the specific requirements of the Appointments Clause, and its core purpose of ensuring accountability. Board members are plainly principal officers who should not be appointed without the democratically accountable President and Senate taking responsibility. Even if Board members are inferior officers, moreover, Congress has improperly delegated their appointment to an independent agency that does not share the President's accountability.

"The 'manipulation of official appointments'" was among the "revolutionary generation's greatest grievances." *Freytag*, 501 U.S. at 883 (quoting Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, at 79 (1969)). Consequently, "[t]hose who framed our Constitution ... carefully husband[ed] the appointment power to limit its

diffusion." *Id.*; *see also Ryder v. United States*, 515 U.S. 177, 182 (1995); *Weiss v. United States*, 510 U.S. 163, 188-89 (1994) (Souter, J., concurring). "The Framers understood ... that by limiting the appointment power, they could ensure that those who wield[] it [a]re accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884. Thus, the "Clause [was] designed to preserve political accountability relative to important Government assignments." *Edmond*, 520 U.S. at 663. And, again, the Framers viewed the Appointments Clause primarily as a check on abuses by Congress. *See Buckley*, 424 U.S. at 129; *Freytag*, 501 U.S. at 904 n.4 (Scalia, J., concurring in part and concurring in the judgment).

To achieve these ends, the Appointments Clause expressly requires appointment by the politically accountable President with the advice and consent of the Senate. *See* 2 Farrand, *supra*, at 539 (remarks of Gouverneur Morris) ("as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security"). The Excepting Clause, which authorizes Congress to vest the appointment of "inferior Officers" "in the President alone, in the Courts of Law, or in the Heads of Departments," was added at the end of the constitutional debate merely as an "administrative convenience," to prevent the Senate from being overwhelmed by having to confirm all officers. *Edmond*, 520 U.S. at 660; *see also* 2 Farrand, *supra*, at 627-28. "[B]ut that convenience was deemed to outweigh the benefits of the more cumbersome procedure only with respect to the appointment of"

officers whose stations and duties are such that the officers rank as "inferior." *Edmond*, 520 U.S. at 660-61. And, even then, the Excepting Clause maintains accountability by limiting the delegation (as relevant here) to the individual heads of executive departments who are themselves directly answerable to the President. *See Freytag*, 501 U.S. at 886 (heads of departments "share the President's accountability to the people"); *id.* at 907 (Scalia, J., concurring in part and concurring in the judgment) (heads of departments "are directly answerable to the President, who is responsible to *his* constituency for their appointments"); *Weiss*, 510 U.S. at 187 (Souter, J., concurring) ("although they allowed an alternative appointment method for inferior officers, the Framers still structured the alternative to ensure accountability").

A. Board Members Are Principal Officers Who Must Be Appointed by the President and Confirmed by the Senate

This Court has made clear that the line demarcating principal and inferior officers must be drawn in reference to the Appointments Clause's core purpose of preserving political accountability. As a threshold matter, "in the context of a Clause designed to preserve political accountability relative to important Government assignments, ... it [is] evident that 'inferior officers' are officers whose work is *directed and supervised* at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663 (emphasis added). By permitting diffusion of

appointment authority only with respect to subordinates supervised by others for whom the President is responsible, *Edmond* preserves the political accountability demanded by the Clause.

Supervision requires, at a minimum, two basic components. First, to be "inferior," an officer must be subject to effective discipline through the power of removal—a power that this Court has regularly described as the "most important[]" means and a "powerful tool" of supervision and control. *Morrison*, 487 U.S. at 696; *Edmond*, 520 U.S. at 664. In *Edmond*, for example, the Court relied upon the Judge Advocate General's power to remove military judges *without cause* as a principal factor in concluding that these judges were inferior officers. *Edmond*, 520 U.S. at 666; *see also id.* at 668 (Souter, J., concurring in part and concurring in the judgment). Similarly, in *Morrison*, the Attorney General's authority to remove the independent counsel for good cause was one of the key factors supporting the independent counsel's characterization as an inferior officer. 487 U.S. at 671; *see also Applicability of Executive Order No. 12674 to Personnel of Regional Fishery Management Councils*, 17 Op. Off. Legal Counsel 150, 155-57 (1993) (officers are *not* "subject to the supervision of" the Secretary of Commerce because the statute "severely limits the Secretary's removal power and is [therefore] designed to constrain narrowly the Secretary's ability to supervise and control the Council members he appoints").

The second essential component of supervision is the authority of a superior to guide an inferior officer's actions at the outset, through ongoing, day-to-day oversight and "direct[ion]" of the inferior officer's execution of his duties. *See Edmond*, 520 U.S. at 663-65; *Morrison*, 487 U.S. at 671-72. In *Edmond*, for instance, this Court emphasized the Judge Advocate General's significant ongoing, day-to-day supervision of the Coast Guard Judges, noting in particular that the Judge Advocate General exercised "administrative oversight" over the court on which these judges sat and was charged with the responsibility to prescribe uniform rules of procedure and policies for the court. *See* 520 U.S. at 664.

Finally, while "[h]aving a superior officer is necessary for inferior officer status, [it is] not sufficient to establish it." *Id.* at 667 (Souter, J., concurring in part and concurring in the judgment); *see also Morrison*, 487 U.S. at 722 (Scalia, J., dissenting). As Madison observed in connection with the debate over the Excepting Clause, the federal government was to include "Superior Officers *below* Heads of Departments." 2 Farrand, *supra*, at 627 (emphasis added); *accord Morrison*, 487 U.S. at 722 (Scalia, J., dissenting). Indeed, the Appointments Clause *itself* recognizes that there will be principal officers supervised by other principal officers. It defines "Ambassadors, other public Ministers and Consuls" (Pet. App. 183a) as principal officers requiring Senate confirmation, *see Freytag*, 501 U.S. at 884 (noting Clause's inclusion of ambassadors and ministers among "the principal federal officers"); *Morrison*, 487 U.S. at 672 (noting "Clause's specific

reference to 'Consuls' as principal officers"); *United States v. Eaton*, 169 U.S. 331, 344 (1898) (certain vice consuls "were ... in reality principal officials"). Such diplomatic officers were principals even though during the Founding era (as now) they were supervised and directed by the Secretary of State. *See* Foreign Affairs Act of 1789, ch. 4, 1 Stat. 28, 28-29 (Secretary shall "perform and execute such duties ... relative to correspondences, commissions or instructions to or with public ministers or consuls").

Thus, in addition to determining whether an officer has a superior, the Court must look to the nature of the office and its duties, asking whether the officer enjoys broad authority to "formulate policy" in a permanent office with statutory authority, or rather is "empowered ... to perform only certain, limited duties," in an office "limited in tenure." *Morrison*, 487 U.S. at 671-72.

1. Measured against these standards, it is clear that Board members are principal, rather than inferior, officers. *First*, at the most basic level, every defining attribute of the Board demonstrates that it is an independent entity with an autonomy and authority requiring that its members be selected and confirmed by the politically accountable President and Senate.

Congress itself recognizes that "the PCAOB is an independent board with sweeping powers and authority." *GAO Report*, *supra*, at 6. With respect to autonomy, Congress designated the Board a private "corporation" outside *any* governmental chain of command or public oversight, such as FOIA. SOX

§ 101(b), 15 U.S.C. § 7211(b). With respect to autonomy and power, Board members establish standards for "all accountants and everybody they work for, which directly or indirectly is every breathing person in the country," 148 Cong. Rec. at 12,119, pursuant to an extraordinarily broad "public interest" mandate, SOX § 101(a), 15 U.S.C. § 7211(a), enforceable through *criminal* sanctions for willful violations of Board regulations, *see* Exchange Act § 32(a), 15 U.S.C. § 78ff(a) (made applicable by SOX § 3(b), 15 U.S.C. § 7202(b)). Board members are thus the polar opposites of the independent counsel, who had no policy-making or administrative authority in her temporary, case-specific assignment.

Equally important, the Board has the unique power to directly *tax* designated entities to fund itself, SOX § 109(d), 15 U.S.C. § 7219(d), thus both vesting it with tremendous power and freeing it from the normal constraints and oversight inherent in the congressional budget process. It is not remotely plausible that the Framers, who founded this Nation largely because of taxation without representation, would authorize the taxing power to be exercised by officers appointed without any input by the people's representatives—executive or legislative.

Even the emoluments of the office—a traditional factor in determining officer status, *see, e.g.*, *United States v. Germaine*, 99 U.S. 508, 512 (1878)—support a finding of principal-officer status here, as Board members' salaries—$673,000 for the Chairman and $547,000 for each of the other members, *see supra* p. 3—far exceed that of the President and are roughly

four times greater than those of their alleged "superiors" at the SEC, *see* 5 U.S.C. §§ 5314-15; U.S. Office of Pers. Mgmt., Salary Table No. 2009-EX.

Second, uniform historical practice confirms that the members are principal officers. The heads of *all* agencies or quasi-governmental corporations are appointed by the President with Senate confirmation, *see* Pet. App. 62a[5]—reflecting the historical consensus that those who run their own "shops" are necessarily superior officers. Like all those agencies, the Board is a separate entity with its own budget, statutory responsibilities and personnel.

This consistent practice provides powerful evidence that Board members are principal officers, and not even the Act itself reflects a different judgment about their status under the Appointments Clause. Congress mistakenly believed that the members were not "officer[s] ... or agent[s of] the Federal Government" *at all*. SOX § 101(b); 15 U.S.C. § 7211(b). Thus, Congress' decision to forego Presidential appointment and Senate confirmation reflects no "'congressional determination'"—much less one subject to judicial "'tolerance'"—that the members are "inferior" officers, *Weiss*, 510 U.S. at 194 (Souter, J., concurring) (quoting *In re Sealed Case*, 838 F.2d at 532 (R.B. Ginsburg, J., dissenting)), but rather reflects only the concededly erroneous

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[5] *See also, e.g.*, 12 U.S.C. § 2 (OCC); *id.* § 241 (Federal Reserve Board); *id.* § 1462a(c)(1) (OTS); *id.* § 1812(a) (FDIC); 15 U.S.C. § 41 (FTC); *id.* § 78d(a) (SEC); *id.* § 2053(a) (CPSC); 42 U.S.C. § 2996c(a) (LSC); 47 U.S.C. § 154(a) (FCC); 49 U.S.C. § 24302(a) (Amtrak).

view that members are not public officers even subject to the Appointments Clause.

Third, contrary to the decision below, this principal status is not altered simply because the officers' work is subject to review by a higher authority. That conclusion is not only contrary to Madison's contemporaneous statement and the text's reference to "ambassadors" and "consul" overseen by the Secretary of State, *see supra* pp. 47-48, but would mean that officials as powerful and autonomous as the Secretaries of the Army and Navy and the heads of the CIA, IRS, FDA, FAA and Joint Chiefs of Staff—all currently Presidential appointees subject to Senate confirmation—are inferior officers because their work product is, or at least potentially is, subject to review by higher-ranking executive officers.[6]

Permitting such important officers to take office without "the joint participation of the President and the Senate" would allow the political branches to evade "public accountability for both the making of a bad appointment and the rejection of a good one." *Edmond*, 520 U.S. at 660; *see also Freytag*, 501 U.S. at 884; *Weiss*, 510 U.S. at 188 n.3 (Souter, J., concurring) ("if Congress ... authorizes a lower level Executive Branch official to appoint a principal officer, it ... has adopted a more diffuse and less accountable mode of appointment than the Constitution requires").

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[6] *See* 10 U.S.C. §§ 153(a), 3013(b), 5013(b); 21 U.S.C. § 393(d)(2); 26 U.S.C. § 7801(a)(1); 49 U.S.C. § 106(f)(3)(B)(i); 50 U.S.C. § 403-4a(b).

This is particularly true if the higher authority is an *independent* agency like the SEC, for whom the democraticaliy elected President is *not* responsible. Such an arrangement undermines the Framers' decision to "ensure that those who wield[] [appointment power] [a]re accountable to political force and the will of the people," *Freytag*, 501 U.S. at 884, and "deprives the public of any realistic ability to hold easily identifiable elected officials to account for bad appointments," *Weiss*, 510 U.S. at 191 (Souter, J., concurring). Thus, even assuming *arguendo* that independent agencies can be "Departments" under the Clause, *but see infra* pp. 57-59, oversight by such agencies cannot render the supervised officers "inferior." *See* Laurence H. Tribe, *American Constitutional Law* § 4-8, at 684 (3d ed. 2000) ("[where] officer is appointed by persons who are themselves not politically accountable ... ongoing supervision by ... the President or by someone serving at [his] pleasure, seems particularly important").

Indeed, the Act's appointment scheme seems consciously designed to guarantee that all involved can *evade* accountability if Board members fail to unearth Enron-like accounting fraud. The President would obviously not be responsible for the failures of officials he does not select or replace; the SEC Chairman would not be responsible because his appointment powers have been diffused to all the Commissioners; and even the Commissioners would not be responsible because there is an inherent "lack of accountability" in appointments by a "multimember executive," *Freytag*, 501 U.S. at 904-05 (Scalia, J., concurring in part and concurring in the

judgment), and, in any event, they have no extant mechanism for reviewing the Board's failures to investigate and cannot remove Board members for such mistakes in judgment. Thus, if the central issue in a Presidential re-election campaign were the Board's failure to adequately police the financial markets, the incumbent would not be responsible for that failure and the new President could not remove the members that he, and the American public that elected him, view as incompetent.

2. In all events, Board members are not "directed and supervised" by the SEC.

First, as discussed above, Board members—unlike the inferior officers in *Edmond*, *Freytag* and *Morrison*—may be removed only for willful abuse of authority, but not for pursuing policies disliked by the SEC. Procedural safeguards cabin the SEC's removal authority even further, as Board members may be removed only after notice and the opportunity for a hearing, *see* SOX § 107(d)(3), 15 U.S.C. § 7217(d)(3), subject to judicial review, *see* Exchange Act § 25(a)(1), 15 U.S.C. § 78y(a)(1). Where a purported subordinate cannot be removed for pursuing policies at odds with the agency's desired policies, then he is not subject to "direction and supervision" under any reasonable understanding of that phrase.

Second, the Act authorizes only facially incomplete and severely restricted day-to-day supervision by the SEC. Board members exercise vast prosecutorial authority that is subject to no SEC oversight at all. The SEC exercises no control over which firms are

subjected to the Board's "continuing program of inspections" or whether a more formal, burdensome "investigation" is warranted because a violation "may" have occurred. *See supra* pp. 3-4. And the SEC has no authority to direct Board members to impose sanctions on the target of an investigation when they choose not to. *See supra* p. 4. In short, the SEC exercises no control over Board members' daily exercise of their prosecutorial discretion. It is only *after* Board members have effectively concluded their investigation and decided to impose sanctions that their enforcement operations are subject to any oversight at all.

Third, the SEC's restricted after-the-fact review of Board sanctions and rules does not constitute direction or supervision because it "does not extend to [the members] personally, but is limited to their judgments." *Edmond*, 520 U.S. at 667 (Souter, J., concurring in part and concurring in the judgment). The Appointments Clause deals with "Officers," not offices, making it clear that for an officer to be inferior, a superior must directly supervise *the officer*, and not just review the substantive work product of the office. Thus, for example, it is well-established that "'lower federal judges'"—despite sitting on "inferior Courts" whose judgments are reviewed by superior courts, U.S. Const. art. III, § 1—"'are principal officers' because they are 'not subject to personal supervision.'" *Edmond*, 520 U.S. at 667 (Souter, J., concurring in part and concurring in the judgment) (quoting *In re Sealed Case*, 838 F.2d at 483); *see also Weiss*, 510 U.S. at 191 n.7 (Souter, J., concurring).

Moreover, the SEC's passive power to *review* Board rulemaking and sanctions only allows it to veto *mistakes* by the Board, but not to proactively prescribe how Board members *should* act, particularly in case-specific enforcement. It is therefore neither "direction" nor "supervision." *See Edmond*, 520 U.S. at 664-65. After all, the fact that the Office of Management and Budget may review and return proposed regulations by the heads of cabinet departments, *see* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), does not render those officers "inferior" or suggest that they are "directed or supervised" by OMB.

This is particularly true since the SEC "*shall*" approve Board rules so long as it finds them "consistent with the requirements of th[e] Act and the securities laws, *or* ... necessary or appropriate in the public interest or for the protection of investors." SOX § 107(b)(3), 15 U.S.C. § 7217(b)(3) (emphasis added). Federal courts do not supervise and direct agencies by overturning rules not "consistent with" the relevant statute.

The SEC's limited power to "abrogate" the Board's rules or (allegedly) to issue its own rules usurping Board functions, *see supra* pp. 5, 30, likewise does not direct or supervise Board members' activity—it *supplants* it. This no more constitutes the power to supervise members' enforcement conduct than does Congress' ability to amend or provide a new substantive statute. That is why *Morrison* held that the Special Division's power to "define" and "expand" the "scope" of the independent counsel's "jurisdiction"

(487 U.S. at 679, 680 n.18) and to "terminate" the office (*id.* at 680), "simply does not give the Division the power to 'supervise' the independent counsel in the exercise of his or her investigative or prosecutorial authority" (*id.* at 681), or otherwise vest any supervisory power even "approaching the power to *remove* the counsel" (*id.* at 682). In all events, the wholly *unexercised* (alleged) authority of the SEC to take over certain powers from the Board hardly suggests that the SEC *now* "supervises" Board members' continuing exercise of those powers.

Finally, unlike the appellate judges in *Edmond*, who could not affect the public *except* through their "final decision[s]," which were always subject to review by "other Executive officers," *Edmond*, 520 U.S. at 665, Board members routinely affect the public—through inspections, investigations, "no sanction" decisions—without any oversight by the SEC.

In sum, Board members are principal officers who must be appointed by the President with the advice and consent of the Senate.

B. SEC Appointment Violates the Clause Even if Board Members Are Inferior Officers

Even if Board members were inferior officers whose appointment could be lodged in the "Head" of a "Department," independent agencies like the SEC are not "Departments" because they are not directly accountable to the President. In any event, the five commissioners are not the "Head" of the SEC—the Chairman is.

1. The SEC Is Not a "Department"

As a modest "administrative convenience," the Excepting Clause must be interpreted in a manner consistent with the Appointment Clause's core purpose of ensuring Presidential accountability through a chain of command. *See supra* pp. 43-45. Thus, the Court has consistently held that "Departments" includes only those entities that, like the cabinet departments, are directly accountable to the President. *See, e.g., United States v Mouat*, 124 U.S. 303, 307 (1888) ("heads of departments" consist of "what are now called the members of the cabinet").[7] The Executive Branch, too, has long recognized that "departments" are those divisions "with heads thereof discharging their administrative duties in such manner as the President should direct, and being in fact the executors of the will of the President." *Relation of the President to the Executive Departments*, 7 Op. Att'y Gen. 453, 463 (1855).

In *Freytag*, the Court embraced this understanding and made clear that the *sine qua non* of a "Department" is that the entity be directly accountable to the President. The Tax Court at issue there was, at bottom, "an independent agency ... within the Executive Branch." 501 U.S. at 885. But

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[7] *See also Buckley*, 424 U.S. at 127 ("[t]he phrase 'Heads of Departments,' ... suggests that the Departments referred to are themselves in the Executive Branch or at least have some connection with that branch"); *Burnap v. United States*, 252 U.S. 512, 515 (1920); *Cunningham v. Neagle*, 135 U.S. 1, 63 (1890); *Germaine*, 99 U.S. at 510.

the Court held that the term "Department" is confined only to those agencies that resemble cabinet departments, especially in that their "heads are subject to the exercise of political oversight and share the President's accountability to the people." *Id.* at 886; *see also Myers*, 272 U.S. at 133 ("[e]ach head of a department is and *must be* the President's *alter ego*" (emphasis added)).

The Court recognized that, "[g]iven the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint." *Freytag*, 501 U.S. at 885. And because, unlike the cabinet departments, the Tax Court was an independent agency beyond the President's supervisory control, "[t]reating the Tax Court as a 'Department' and its Chief Judge as its 'Hea[d]' would defy the purpose of the Appointments Clause" and "the meaning of the Constitution's text." *Id.* at 888 (second alteration in *Freytag*); *see also id.* at 886-87 (noting other constitutional provisions likewise using "executive department" to refer to cabinet departments).

Justice Scalia's separate opinion in *Freytag* agreed that the Clause "lodge[s]" the "power of appointment" only in those officers who are "*directly answerable to the President*" because, although "they are not themselves able to resist congressional encroachment," the President has such independence and has the "motive and means to assure faithful action by his *direct lieutenants*." *Id.* at 907 (emphasis added). Accordingly, excluding

independent agencies from "Departments" is a "reasonable position" since "much of the *raison d'être* for permitting appointive power to be lodged in 'Heads of Departments' does not exist with respect to the heads of *these* agencies, because they, in fact, will not be shored up by the President and are thus not resistant to congressional pressures." *Id.* at 921 (citation omitted); *see also supra* pp. 20, 22-23. Thus, *all* the Justices in *Freytag* agreed that the Appointments Clause's clear purpose was to lodge appointive power only in those "directly answerable" to the President.[8]

Consequently, the *independent* SEC is not a "Department" for purposes of the Appointments Clause. To conclude otherwise, and allow the appointment power to be diffused beyond the single, responsible President, would effectively overrule *Freytag* and contravene the very purpose of that Clause.

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[8] Justice Scalia nonetheless opined that independent establishments could be Departments because "adjusting the remainder of the Constitution to compensate for *Humphrey's Executor*['s]" mistaken endorsement of a "'headless Fourth Branch'" is "a fruitless endeavor." 501 U.S. at 921; *see also Morrison*, 487 U.S. at 724-27 (Scalia, J., dissenting). But even if *preserving* the "headless Fourth Branch" *status quo* somehow justifies exacerbating *Humphrey's Executor*'s diminution of Presidential control by erroneously extending the "Department" designation to agencies that are not the President's "direct lieutenants" (and thus lack the essential characteristic defining "Departments"), surely it is not "fruitless" to stop Congress' *novel* effort here to *leverage* non-Department "Fourth Branch" agencies to create an unprecedented "Fifth Branch" of "private" corporations with massive power and no Presidential oversight.

2. The Five Commissioners Are Not the SEC's "Head"

Another independent constitutional impediment to the SEC's appointment of Board members is the fact that the SEC *as a whole* is charged with the appointment responsibility. As noted, the "Framers recognized the dangers posed by an excessively diffuse appointment power," and "rejected efforts to expand that power" beyond a single person. *Freytag*, 501 U.S. at 885; *see also The Federalist No. 76*, at 511 (Hamilton) (one person making appointments would not "be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body"); 3 Joseph Story, *Commentaries on the Constitution* § 1523 (1833) ("one man of discernment is better fitted to analyze and estimate the peculiar qualities, adapted to particular offices, than any body of men of equal, or even of superior discernment").

Moreover, the phrase "*Heads* of Departments," does not connote a committee of equals because a "head" was well-known to be "[a] chief; a principal person; a leader; a commander; *one* who has the *first* rank or place, and to whom others are subordinate; as the *head* of an army; the *head* of a sect or party." Noah Webster, *An American Dictionary of the English Language* (photo. reprint 1970) (1828) (emphasis added).

The Court need not decide whether collective bodies may *ever* be "Heads," however, because it is clear that the head of the SEC is its Chairman. In 1950, President Truman exercised his statutorily

defined power to "provide for the appointment and pay of the *head* ... of any agency," Reorganization Act of 1949, 5 U.S.C. § 904(2) (emphasis added), by delegating to the SEC Chairman "the executive and administrative functions of the Commission, [including] ... the appointment and supervision of personnel employed under the Commission." Reorganization Plan No. 10 of 1950, § 1(a), 15 Fed. Reg. 3175 (May 25, 1950), *reprinted in* 5 U.S.C. app. In doing so, the President expressly equated "the Chairmen of regulatory bodies" with the "heads of departments," and noted that he was "placing" the delegated authority "in the *heads* of ... [the] agencies." President's Special Message to the Congress Summarizing the New Reorganization Plans, 1950 Pub. Papers 195, 196-97 (Mar. 13, 1950) (emphasis added). He did so to provide the accountability demanded by the Appointments Clause by ensuring that the "Chairmen of regulatory bodies will be made clearly responsible for the effectiveness and economy of Governmental administration and will be given corresponding authority, so that the public, the Congress, and the President may hold them accountable." *Id.*

Consequently, the Chairman "controls key personnel, internal organization, and the expenditure of funds," and thus "exerts far more control [over the SEC] than his one vote would seem to indicate." *Blinder*, 855 F.2d at 681; *see also* Pet. App. 28a-29a (noting Chairman's "domina[nce]"). Indeed, the SEC itself recognizes that the Chairman is "the SEC's top executive." SEC, *Current SEC Commissioners*, http://www.sec.gov/about/commissioner.shtml (last

visited July 27, 2009). Viewing the Chairman as the head of the SEC also reinforces the political accountability required by the Appointments Clause, because the Chairman serves (as Chairman) at the pleasure of the President, and is therefore somewhat politically accountable to him.

Indeed, if the Chairman is not the "Head" of the SEC, then any inferior officers at the SEC—which might include the Directors of the SEC's four main divisions and the agency's General Counsel—have been unconstitutionally appointed. All were appointed by the Chairman *alone* rather than by the whole Commission. *See* Reorganization Plan No. 10 of 1950, § 1(a). Indeed, because the power to appoint inferior officers at numerous other multi-member agencies is likewise expressly vested in the Chairmen, *see, e.g.*, 7 U.S.C. § 2(a)(6) (CFTC); 46 U.S.C. § 301(c) (FMC); Reorganization Plan No. 8 of 1950, § 1(a), 15 Fed. Reg. 3175 (May 25, 1950), *reprinted in* 5 U.S.C. app. (FTC); Reorganization Plan No. 1 of 1980, § 1(b), 45 Fed. Reg. 40,561 (June 16, 1980), *reprinted in* 5 U.S.C. app. (NRC), a holding that independent agencies are multi-headed for Appointments Clause purposes would create problems across the government.

CONCLUSION

The Court should reverse the judgment of the court of appeals, declare the Board and the Act unconstitutional, and remand the case for further proceedings.

Respectfully submitted,

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RESPONDENT'S BRIEF

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FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,
Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR RESPONDENTS PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, *ET AL.*

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QUESTIONS PRESENTED

The Sarbanes-Oxley Act of 2002 established the Public Company Accounting Oversight Board ("Board") and subjected it to the comprehensive oversight of the Securities and Exchange Commission ("SEC"). The questions presented are:

1. Whether petitioners' failure to invoke the exclusive statutory review procedures deprives this Court of jurisdiction.

2. Whether the court of appeals correctly held that Board members are inferior officers under the Appointments Clause because they are "directed and supervised" by the SEC.

3. Whether the court of appeals correctly held that the SEC is a "department" and that the Commissioners collectively constitute its "head" within the meaning of the Appointments Clause.

4. Whether the court of appeals correctly held that the Sarbanes-Oxley Act is consistent with separation-of-powers principles because—given the SEC's pervasive control over the Board and the President's oversight of the SEC—the statute preserves the President's ability to ensure faithful execution of the laws.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, the Public Company Accounting Oversight Board states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

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IN THE

Supreme Court of the United States

NO. 08-861

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,
Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR RESPONDENTS PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, *ET AL.*

STATEMENT

I. STATUTORY FRAMEWORK

A. Background

Auditors play a crucial role in the federally regulated securities markets. To assure investors that annual financial statements filed with the Securities and Exchange Commission ("SEC") comply with accounting requirements, those statements must be audited. See 17 C.F.R. §§210.2-01 *et seq.* Auditors thus serve as "'public watchdog[s]'"—a role that "requires complete fidelity to

the public trust." *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 818 (1984).

Until recently, the SEC looked to private organizations affiliated with the accounting profession to set auditing standards. See S. Comm. Print No. 107-75, at 17-18 (2002). Accounting firms or their representatives controlled or funded those organizations. See *ibid.* As a result, "standards tend[ed] to be written to protect the accounting firms." *Accounting Reform and Investor Protection: Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. 217 (2002) ("*Senate Hearings*") (Turner). Enforcement was similarly ineffective. While the profession created a Public Oversight Board ("POB") in the 1970s to conduct "peer reviews," for more than 20 years "there ha[d] never been a negative review of a major firm." *Id.* at 76 (Williams). And when the POB sought to investigate several firms in 2000, the profession cut off its funding. *Id.* at 897 (Bowsher).

In 2001-2002, those shortcomings came home to roost as audit failures at Enron and other companies cost investors hundreds of billions of dollars. See 148 Cong. Rec. 12,113 (2002) (Sarbanes). Congress conducted two dozen hearings and considered more than 20 bills. See 1 *Corporate Fraud Responsibility*, at xi-xxi (Manz ed., 2003). Recognizing that auditor self-regulation had failed, Congress sought to "end the system of self-regulation in the accounting profession" and replace it with a "strong independent accounting oversight board"—"independent," that is, from the accounting profession. 148 Cong. Rec. 14,440 (2002) (Sarbanes); see *id.* at 14,444 (Enzi); *id.* at 14,487 (LaFalce); *Senate Hearings* 15-16 (Levitt); *id.* at 24 (Williams); *id.* at 106 (Volcker); *id.* at 245-246 (Turner); *id.* at 898-899 (Bowsher); *H.R. 3763*—

The Corporate and Auditing Accountability, Responsibility and Transparency Act of 2002, Hearings Before the H. Comm. on Financial Services, 107th Cong. 50 (2002) ("*House Hearings*") (Roper); *id.* at 200 (Melancon).

Congress considered vesting the new regulatory responsibilities in the SEC itself. See Corporate Auditing Integrity Act of 2002, H.R. 5184, 107th Cong. (2002). But witnesses testified that the SEC was "already overtaxed" and could not "effectively discharge these additional responsibilities." *House Hearings* 157-158 (Walker); see *Senate Hearings* 38 (Levitt); *ibid.* (Hills); *id.* at 223 (Turner). Legislators wanted an entity "solely focused on companies that audit." 148 Cong. Rec. 12,943 (2002) (Snowe); see *id.* at 12,940 (Kohl). They also wanted to offer salaries "fully competitive with comparable private-sector positions in order to ensure a high-quality staff." *Id.* at 12,115 (Sarbanes); see S. Rep. No. 107-205, at 7 (2002). But witnesses advised that "attract[ing], competitively compensat[ing] and retain[ing] such staff * * * is probably easier accomplished in [a] private board as opposed to the SEC." *Senate Hearings* 246 (Turner); see *id.* at 1036 (Metzenbaum); *id.* at 1087-1088 (Pitt).

Congress nonetheless recognized a need for comprehensive SEC supervision. SEC authority over the new entity was necessary "to meet the constitutional test," 148 Cong. Rec. 12,120 (2002) (Gramm), and "SEC oversight and review" would ensure that the new entity's policies were "consistent with the administration of the federal securities laws," S. Rep. No. 107-205, at 12. The SEC's "comprehensive authority" would also prevent "duplicat[ion] [of] efforts," 148 Cong. Rec. 12,460 (2002) (LaFalce), and preserve "the benefit of [the SEC's]

nearly 70 years of public service," *House Hearings* 158-159 (Breeden).

B. The Sarbanes-Oxley Act

The product of Congress's deliberations was the Sarbanes-Oxley Act of 2002. The Act established the Public Company Accounting Oversight Board ("Board") to "oversee the audit of public companies," subject to the SEC's comprehensive control. See 15 U.S.C. §§7211(a), 7217. The Board registers accounting firms, promulgates auditing standards, conducts inspections, and investigates and disciplines violations. *Id.* §7211(c).

Congress ensured the Board's independence from the accounting profession. The Board's five members are appointed not by the profession but by the SEC. 15 U.S.C. §7211(e)(4). Only two may be accountants, and the Chairman cannot have been a practicing accountant for five years. *Id.* §7211(e)(2). Board members cannot engage in professional activities or receive payments from accounting firms other than standard retirement benefits. *Id.* §7211(e)(3). Finally, to address the funding problems that had compromised the independence of prior organizations, Congress established a support fee for the Board paid by public companies. *Id.* §7219(c)-(d).

By assigning the Board only one duty—audit oversight—Congress created an entity focused exclusively on the problem it sought to remedy. See 15 U.S.C. §7211(c). Congress addressed the need to attract experienced professionals by declaring the Board to be a private nonprofit corporation, *id.* §7211(b), and empowering it to pay private-sector salaries, *id.* §7211(f)(4).

Congress expressly granted the SEC "oversight and enforcement authority over the Board." 15 U.S.C. §7217(a). It patterned that control in part on the SEC's

authority over self-regulatory organizations ("SROs") like the National Association of Securities Dealers. See S. Rep. No. 107-205, at 12. SROs have long helped oversee the securities industry, but always subject to pervasive SEC oversight: SROs "'have no authority to regulate independently of the SEC's control.'" *NASD* v. *SEC*, 431 F.3d 803, 807 (D.C. Cir. 2005) (quoting S. Rep. No. 94-75, at 23 (1975)). Sarbanes-Oxley incorporates and supplements those oversight provisions.

SEC Control Over Rules. The SEC has plenary control over Board rules, including auditing standards. "No rule of the Board [is] effective without prior approval of the Commission * * * ." 15 U.S.C. §7217(b)(2). (There is an exception for certain internal "housekeeping" rules, but the SEC can abrogate those "summarily." See *id.* §78s(b)(3).) The SEC may also abrogate, delete from, or add to existing Board rules "to assure the fair administration of the [Board] * * * or otherwise further the purposes of th[e] Act, the securities laws, and the rules and regulations thereunder applicable to th[e] Board." *Id.* §7217(b)(5).

SEC Control Over Sanctions. The SEC can review any Board sanction on its own initiative or upon request. 15 U.S.C. §7217(c)(2). Findings are reviewed *de novo*, see *NASD*, 431 F.3d at 804, and the SEC can "enhance, modify, cancel, reduce, or require the remission of" any sanction it deems "not necessary or appropriate in furtherance of th[e] Act or the securities laws" or "excessive, oppressive, inadequate, or otherwise not appropriate," 15 U.S.C. §7217(c)(3). Sanctions are automatically stayed pending SEC review unless the SEC orders otherwise. *Id.* §7215(e)(1).

SEC Control Over Inspections, Investigations, and Disciplinary Proceedings. Board inspections, investiga-

tions, and disciplinary proceedings must be conducted according to SEC-approved rules. 15 U.S.C. §§7214(c), 7215(a). Investigations involving potential securities-law violations must be coordinated with the SEC. *Id.* §7215(b)(4)(A). The Board has no subpoena authority; it can only ask the SEC to issue subpoenas. *Id.* §7215(b)(2)(D). Disciplinary proceedings are not public unless a party consents, *id.* §7215(c)(2), and Board inspection reports are subject to SEC review, *id.* §7214(h).

SEC Control Over Registration. Registration of accounting firms is governed by SEC-approved rules. 15 U.S.C. §7212(b)(1). Denial of registration is subject to plenary SEC review. See *id.* §7212(c)(2).

SEC Control Over Board Members. The SEC appoints the Board's members for five-year terms, 15 U.S.C. §7211(e)(4)-(5), and can remove them "for good cause," *id.* §7211(e)(6). Cause exists where a Board member has "willfully violated any provision of th[e] Act, the rules of the Board, or the securities laws"; has "willfully abused [his] authority"; or, "without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard." *Id.* §7217(d)(3). The SEC can also censure Board members, censure the Board, or limit Board activities. *Id.* §7217(d)(2)-(3).

SEC Control Over Jurisdiction. The SEC has broad authority to "relieve the Board of any responsibility to enforce compliance with any provision of th[e] Act, the securities laws, the rules of the Board, or professional standards." 15 U.S.C. §7217(d)(1). It can exercise that power whenever doing so is "consistent with the public interest, the protection of investors, and the other purposes of th[e] Act and the securities laws." *Ibid.* The SEC can also add to the Board's duties. *Id.* §7211(c)(5).

SEC Control Over Finances. The Board's budget is subject to annual SEC approval. 15 U.S.C. §7219(b). Under the SEC's rules, the SEC can condition approval on specific changes. *PCAOB Budget Approval Process*, 71 Fed. Reg. 41,998, 42,000 (July 24, 2006). The Board's support fee, and the rules for allocating, assessing, and collecting it, must also be approved by the SEC. 15 U.S.C. §7219(d).

SEC Control Over Internal Processes. The Board began operations only once the SEC found it ready. 15 U.S.C. §7211(d). The SEC can impose record-keeping and reporting requirements on the Board, and it can examine Board records. *Id.* §7217(a) (incorporating 15 U.S.C. §78q(a)(1), (b)(1)). Even the Board's ability to initiate or defend a lawsuit is subject to SEC approval. *Id.* §7211(f)(1). In granting approval to defend this very suit, the SEC required that its General Counsel oversee every aspect of the Board's defense—from selection of outside counsel to the content of all filings.

The SEC's Independent Authority. Sarbanes-Oxley preserves the SEC's pre-existing authority, 15 U.S.C. §7202(c), and authorizes the SEC to promulgate rules to implement the Act, *id.* §7202(a). The SEC can conduct its own investigations into potential violations of Board rules. *Id.* §78u(a)(1). And any violation is "treated for all purposes in the same manner as a violation of the Securities Exchange Act" subject to the SEC's own disciplinary authority. See *id.* §7202(b)(1). The SEC can thus "proceed under the bill's provisions directly if appropriate." S. Rep. No. 107-205, at 12.

II. THIS LAWSUIT

A. Proceedings in District Court

Petitioner Beckstead and Watts, LLP ("Beckstead") is a Nevada accounting firm registered with the Board. J.A. 64-65. After an inspection uncovered apparent deficiencies in several Beckstead audits, the Board initiated a formal investigation. *Id.* at 65-66. Beckstead, together with Free Enterprise Fund, responded by filing this suit alleging that Sarbanes-Oxley violates separation of powers and the Appointments Clause. Pet. App. 8a. The United States intervened to defend the Act. *Ibid.*

The district court granted summary judgment upholding the Act. It noted that Sarbanes-Oxley establishes an exclusive review scheme, and acknowledged a "colorable" argument that petitioners' failure to invoke that scheme deprived it of jurisdiction. Pet. App. 111a. But the court ultimately determined that it had jurisdiction. *Ibid.* The court nevertheless rejected all of petitioners' claims. *Id.* at 112a-116a.

B. The Court of Appeals' Decision

The court of appeals affirmed. After concluding that the district court had jurisdiction, Pet. App. 9a-11a, it held that Sarbanes-Oxley violates neither the Appointments Clause nor separation-of-powers principles, *id.* at 11a-40a.

1. While principal officers must be appointed by the President and confirmed by the Senate, Congress can "vest the Appointment of * * * inferior Officers * * * in the Heads of Departments." U.S. Const. art. II, § 2. The court of appeals rejected petitioners' argument that Board members are principal officers who must be appointed by the President rather than the SEC. Pet. App. 12a-20a. Under *Edmond* v. *United States*, 520 U.S. 651

(1997), "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663. Board members, the court held, are inferior officers because their work is pervasively controlled by the presidentially appointed Commissioners of the SEC. Pet. App. 12a-13a.

All Board rules, the court explained, are subject to SEC approval, and the SEC can modify or abrogate them. Pet. App. 12a. The SEC has "plenary" authority over Board sanctions; it can appoint and remove Board members; and it can "relieve the Board of its enforcement authority altogether." *Id.* at 12a-13a. Like the coast guard judges found to be inferior officers in *Edmond*, moreover, "Board members 'have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.'" *Id.* at 13a (quoting 520 U.S. at 665).

The SEC's pervasive control, the court held, extends to Board inspections, investigations, and disciplinary proceedings. Pet. App. 18a-20a. The Board must conduct those functions under SEC-approved rules that the SEC can alter at any time. See *id.* at 19a-20a. The SEC thus can "modify the Board's investigative authority as it sees fit"—such as by "mandat[ing] that all decisions regarding investigation * * * be approved by the Commission," "'affirmatively command[ing]' an investigation," or "micromanaging" Board operations. *Id.* at 19a-20a & n.6. Because the Board is "subject to comprehensive control by the Commission," the court held, "Board members are inferior officers." *Id.* at 20a.

The court also rejected petitioners' claims that the SEC is not a "department" within the meaning of the Appointments Clause and that the Chairman rather than

the Commission (*i.e.*, the five Commissioners collectively) is the SEC's "head." Citing uniform precedent, the court held that independent agencies like the SEC are "departments" and that the Commission is the SEC's "head." See Pet. App. 20a-25a.

2. The court similarly rejected petitioners' separation-of-powers challenge. Sarbanes-Oxley does not impermissibly intrude on the President's executive power, the court held, because the SEC has pervasive control over the Board and the President has constitutionally sufficient control over the SEC. See Pet. App. 26a-37a.

The court explained that even so-called "independent agencies" like the SEC have only limited autonomy. Pet. App. 28a. The President appoints SEC Commissioners and can remove them for cause. *Ibid.* Cause includes "'inefficiency, neglect of duty, or malfeasance in office,'" criteria this Court has described as "'very broad,'" authorizing removal "'for any number of actual or perceived transgressions.'" *Id.* at 28a & n.8 (quoting *Bowsher* v. *Synar*, 478 U.S. 714, 729 (1986)).

The SEC, in turn, has "'sweeping'" control over the Board. Pet. App. 29a. "No Board rule is promulgated and no Board sanction is imposed without the Commission's stamp of approval." *Id.* at 30a. And because the SEC can rescind the Board's enforcement authority and enforce the Act itself, it can "'withdraw or preempt any aspect of the Board's substantive regulatory authority at any time.'" *Ibid.* The SEC thus essentially wields "at-will removal power over Board functions." *Id.* at 35a. Properly construed, the Act leaves "no instance in which the Board can make policy that the Commission cannot override." *Id.* at 39a.

3. Judge Kavanaugh dissented in part. Construing the Act's oversight provisions narrowly, he argued that

the Act violates separation of powers and the Appointments Clause. Pet. App. 55a-97a. He agreed with the majority, however, that the SEC is a "department" and that the Commission is its "head." *Id.* at 97a n.24.

SUMMARY OF ARGUMENT

I. The Appointments Clause permits Congress to "vest the Appointment of * * * inferior Officers * * * in the Heads of Departments." U.S. Const. art. II, §2. Congress complied with that provision here: Board members are "inferior officers," the SEC is a "department," and the Commission is its "head."

A. Under *Edmond* v. *United States*, 520 U.S. 651 (1997), "'inferior officers' are officers whose work is directed and supervised at some level" by principal officers. *Id.* at 663. Here, Board members are comprehensively directed and supervised by the Commissioners of the SEC. No Board rule or sanction takes effect except as the SEC chooses to allow, and the SEC can modify rules or sanctions as it sees fit. The SEC also appoints the Board's members, controls the Board's budget, and can rescind the Board's enforcement authority.

Petitioners' contrary claims rest on factors such as salary level that have nothing to do with direction and supervision. Their contention that inferior officers must be removable at will ignores longstanding precedent. And their assertion that the SEC lacks control over inspections, investigations, and disciplinary proceedings ignores both the express statutory text and the settled principle that courts must construe statutes to avoid, not create, constitutional doubt.

B-C. For over 70 years, independent agencies like the SEC have been deemed "departments" capable of appointing their own inferior officers. Although petitioners

urge that "departments" must be "directly accountable to the President," that standard is met here: The President appoints the SEC's Commissioners and can remove them for cause. Moreover, the Commission, not the Chairman, is the SEC's "head." Although the Chairman has additional administrative duties, the Commission exercises all the SEC's important regulatory functions.

II. Sarbanes-Oxley is also consistent with separation-of-powers principles.

A. Congress did not violate separation of powers merely by granting the SEC rather than the President direct authority over the Board. Under *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839), Congress can grant department heads sole authority to remove the inferior officers they appoint. That traditional arrangement does not undermine the President's executive power; it merely requires him to supervise inferior officers in customary "chain of command" fashion. Petitioners' attempt to carve out an exception from that rule for independent agencies lacks any support in precedent or practice.

B. Nor did Congress undermine the President's authority in any other way. Sarbanes-Oxley grants the SEC plenary control over the Board and does not reduce the President's control over the SEC one iota. The President can remove Commissioners for any neglect in supervising the Board. He thus has the same control here as in any other area under the SEC's jurisdiction.

C. Finally, Congress did not aggrandize its own powers. The Act does not increase Congress's powers in any way. And the claim that the Senate impermissibly participates in removal of Board members is incorrect.

ARGUMENT

The Constitution's "structural protections * * * [a]re critical to preserving liberty." *Bowsher* v. *Synar*, 478 U.S. 714, 730 (1986). The Framers vested the "executive Power" in the President and charged him to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§1, 3. Consequently, all officers of the United States exercising executive power must ultimately be accountable to the President, see *Myers* v. *United States*, 272 U.S. 52, 135 (1926), and any statute purporting to grant Congress authority to execute the law would be unconstitutional, see *Metro. Wash. Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991).

This case does not involve any genuine disagreement over those incontrovertible principles. Rather, it arises from petitioners' trumped-up claim that, in enacting Sarbanes-Oxley, Congress set out to deprive the President of executive authority. But Congress neither intended nor did any such thing. Congress designed the Board to be independent from the accounting profession, not to reduce the President's power or to aggrandize its own. To that end, Congress lodged comprehensive control over the Board in the SEC, while leaving the President's authority over the SEC undiminished.

Congress did not run afoul of the Constitution in doing so. The Appointments Clause expressly permits Congress to grant department heads like the Commission power to appoint their own subordinates. And longstanding precedent makes clear that, when Congress does so, it can also grant the department head sole power to remove its subordinates. That traditional arrangement in no way infringes the President's executive power. The Constitution does not require that the President have au-

thority to reach into an agency and remove inferior officers out from under the principal officers who supervise them. Instead, it contemplates that the President will supervise inferior officers in the same "chain of command" fashion in which he has supervised such officers since the dawn of the Republic: by supervising the principal officers to whom they report.

Here, those principal officers—the SEC Commissioners—have plenary control. While petitioners repeatedly quote one of the Act's few legislative *opponents* for claims about the Board's purportedly "'massive . . . unchecked power[s],'" Pet. 2, 35, the Act is unambiguous. The SEC not only controls Board rules and sanctions. It also can divest Board members of their job responsibilities (and paychecks) whenever it deems it appropriate. And it can impose rules requiring the Board to follow its directives and remove any Board member who refuses to comply. This case thus does not involve "double for-cause removal restrictions," "*Humphrey's Executor* squared," or the like. The Constitution protects the President's "executive Power" and duty to "take Care that the Laws be faithfully executed," not removal power for its own sake, and the SEC's plenary powers are no less effective than at-will removal authority in controlling the Board's operations.

The President, in turn, has constitutionally sufficient control over the SEC. Sarbanes-Oxley does not in any way *diminish* that control. To the extent he lacks *plenary* control over the SEC, that is a consequence of decisions of this Court that have stood for more than 70 years and which petitioners do not challenge here. The President has the same control over the SEC's supervision of the Board that he has over any other SEC function. And because the SEC has plenary control over the Board, the

President has the same control as he would have if Congress had lodged the Board's functions in the SEC's own staff. Whatever one thinks of independent agencies generally, "adjusting the remainder of the Constitution to compensate for *Humphrey's Executor* is a fruitless endeavor." *Freytag* v. *Commissioner*, 501 U.S. 868, 921 (1991) (Scalia, J., concurring in judgment). It is precisely that endeavor that petitioners ask this Court to pursue.[1]

I. SARBANES-OXLEY DOES NOT VIOLATE THE APPOINTMENTS CLAUSE

Under the Appointments Clause, principal officers must be nominated by the President and confirmed by the Senate. U.S. Const. art. II, §2. Congress, however, may "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Ibid.* Congress complied with that clause when it authorized the SEC to appoint Board members: Board members are "inferior officers," the SEC is a "department," and the Commission is its "head."

A. Board Members Are Inferior Officers

1. *Board Members Are Directed and Supervised by the SEC*

The standard for distinguishing principal from inferior officers is clear. Under *Edmond* v. *United States*, 520 U.S. 651 (1997), "[w]hether one is an 'inferior' officer depends on whether he has a superior." *Id.* at 662. Consequently, "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663. Here, Board mem-

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[1] The Board adopts the arguments of the United States on the jurisdictional issue. See also Board Br. in Opp. 12-15.

bers are comprehensively "directed and supervised" by the presidentially appointed Commissioners of the SEC.

As the court of appeals observed, "[t]he Commission's authority over the Board is explicit and comprehensive"—"[i]ndeed, it is extraordinary." Pet. App. 7a. The SEC appoints Board members and can censure them, remove them, or limit their activities. 15 U.S.C. §§ 7211(e)(4), (6), 7217(d)(2)-(3). "No rule of the Board"—no auditing standard or procedural rule—is "effective without prior approval of the Commission," and the SEC can abrogate, delete from, or add to Board rules. *Id.* § 7217(b)(2), (5). Board sanctions are subject to plenary SEC review and are automatically stayed pending review. *Id.* §§ 7215(e)(1), 7217(c). Inspections, investigations, and disciplinary proceedings cannot be conducted except under SEC-approved rules. *Id.* §§ 7214(c), 7215(a). The SEC controls the Board's budget. *Id.* § 7219(b). The SEC can impose record-keeping and reporting requirements on the Board, and can examine Board records. *Id.* § 7217(a). The SEC, moreover, can "relieve the Board of any responsibility to enforce" the Act. *Id.* § 7217(d)(1). The SEC thus wields a "vast degree of * * * control at every significant step." Pet. App. 36a.

Board members are subject to at least as much direction and supervision as the coast guard judges held to be inferior officers in *Edmond*. Just as the Judge Advocate General "exercise[d] administrative oversight" over the judges, 520 U.S. at 664, the SEC exercises administrative oversight over the Board, see 15 U.S.C. § 7217(a); p. 23, *infra*. Just as the Judge Advocate General could prescribe "'rules of procedure'" for the judges, 520 U.S. at 664, the SEC can prescribe rules to govern the Board, 15 U.S.C. §§ 7202(a), 7217(b)(5). Just as the Judge Advocate General could remove the judges, 520 U.S. at 664, the

SEC can remove Board members, 15 U.S.C. § 7217(d)(3). Most critically, like the judges, "Board members 'have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.'" Pet. App. 13a (quoting 520 U.S. at 665). "[A]ll Board functions are subject to pervasive Commission control * * * ." *Id.* at 30a-31a. Board rules, sanctions, and other determinations stand *only* if the SEC allows.

Indeed, Board members are subject to *greater* supervision than the coast guard judges in *Edmond*. In that case, review of the judges' factual findings was limited to whether there was "some competent evidence in the record." 520 U.S. at 665. Here, by contrast, the SEC reviews findings underlying Board sanctions *de novo*, see p. 5, *supra*, and can reject or modify any sanction it deems "not appropriate," 15 U.S.C. § 7217(c)(3). The SEC can reject proposed Board rules based on its independent judgment of whether a rule is "consistent with the statutes *and* the public interest," Pet. App. 15a, and can modify or abrogate existing rules to "further the purposes of th[e] Act" and the securities laws, 15 U.S.C. § 7217(b)(5).[2]

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[2] Attempting to manufacture a constitutional violation out of a scrivener's error, petitioners argue that the SEC must approve any Board rule that is *either* "'consistent with the requirements of th[e] Act and the securities laws, *or* . . . necessary or appropriate in the public interest.'" Pet. Br. 55. But Congress obviously could not have intended to require the SEC to approve rules that *violate* the statute so long as they are consistent with the public interest, or vice versa. See *United States* v. *Fisk*, 70 U.S. 445, 447 (1866). The SEC approves rules after finding them both lawful *and* in the public interest. See, *e.g.*, *Order Approving Proposed Auditing Standard No. 4*, 71 Fed. Reg. 7,082, 7,083 (Feb. 10, 2006). Besides, even if the SEC were required to approve a rule it deemed improvident or unlawful, it could immediately *abrogate* the rule under the indisputably broad "further the purposes of th[e] Act" standard. 15 U.S.C. § 7217(b)(5). The notion that Congress would have required the SEC to approve

The SEC can monitor Board operations as "necessary or appropriate in the public interest." *Id.* §§78q(a)(1), (b)(1), 7217(a). Critically, moreover, it can *rescind the Board's enforcement authority* under the broadest of standards—whenever doing so is "consistent with the public interest, the protection of investors, and the other purposes of th[e] Act and the securities laws." *Id.* §7217(d)(1).

Citing the Act's provision designating the Board and its staff non-governmental, petitioners claim that Congress mistakenly believed it did not have to comply with the Appointments Clause. Pet. Br. 50-51. But legislators obtained legal guidance on that very issue. They were advised that the Act complies with the Appointments Clause because the SEC's comprehensive oversight renders Board members inferior officers—not because the Board is private. See Borrus, *Who Watches Accounting's Watchdog?*, Bus. Week Online, Feb. 8, 2006. Congress understood that the SEC needed control "to meet the constitutional test," 148 Cong. Rec. 12,120 (2002) (Gramm), and that the Board was private only "for purposes of [statutory] matters that are within Congress's control," *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995).

2. *Petitioners' Proposed Tests Flout* Edmond

Petitioners begin by invoking factors that have nothing to do with direction and supervision. For example, they urge the Court to look to Board members' salaries. Pet. Br. 49-50. But the test under *Edmond* is direction and supervision, not pay level. The SEC controls Board members' salaries just like every Board function, see 15

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and immediately abrogate rules is absurd but, if Congress did so, the SEC would still have plenary control.

U.S.C. §7219(b), and in fact has directly regulated those salaries, see *Order Approving PCAOB Budget*, 72 Fed. Reg. 73,051, 73,052 (Dec. 26, 2007). Many of the SEC's *own staff* earn more than the Commissioners. See SEC Office of Inspector General, *2008 Audit of Sensitive Payments* 24 (2009). That does not convert them into principal officers. Here, Congress empowered the Board to pay its staff private-sector salaries to attract experienced professionals, see 15 U.S.C. §7211(f)(4); p. 3, *supra*; Board members' salaries were formerly linked to those at the Financial Accounting Standards Board, see 72 Fed. Reg. at 73,052. A private-sector salary does not render an official a principal officer.

Petitioners stress that the Board sets auditing standards that apply nationwide and collects support fees from public companies. Pet. Br. 49. But "[t]he exercise of 'significant authority pursuant to the laws of the United States' marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather * * * the line between officer and nonofficer." *Edmond*, 520 U.S. at 662. What matters here is not the scope of the Board's authority, but the fact that the SEC controls every exercise of it. Board auditing standards and support fees have *no effect* without SEC approval, and the SEC can revise them as it sees fit. See 15 U.S.C. §§7217(b)(2), (5), 7219(d).[3]

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[3] The Board's funding structure is not novel. Other entities with similar support fees include the Municipal Securities Rulemaking Board, 15 U.S.C. §78o-4(b)(2)(J), the Board of Governors of the Federal Reserve System, 12 U.S.C. §243, the Office of the Comptroller of the Currency, *id.* §482, the Office of Thrift Supervision, *id.* §1462a(i), the National Credit Union Administration, *id.* §1755, and various food marketing boards, *e.g.*, 7 U.S.C. §610(b)(2)(ii).

Petitioners contend that "historical practice" makes Board members principal officers because "[t]he heads of *all* agencies or quasi-governmental corporations are appointed by the President with Senate confirmation." Pet. Br. 50. Not so. The Municipal Securities Rulemaking Board's members, for example, were initially appointed by the SEC. 15 U.S.C. §78o-4(b)(1). The Secretary of the Interior appoints 28 of the 30 directors of the National Fish and Wildlife Foundation. 16 U.S.C. §3702(a)-(b). Other similar examples abound, including the Federal Reserve Banks, 12 U.S.C. §302; the National Indian Gaming Commission, 25 U.S.C. §2704(b); the Securities Investor Protection Corporation, 15 U.S.C. §78ccc(c)(2); the Social Security Administration's Office of the Chief Actuary, 42 U.S.C. §902(c); the Postal Service's Office of Inspector General, 39 U.S.C. §202(e); the Board of Veterans' Appeals, 38 U.S.C. §7101A(a); and the Universal Service Administrative Company, 47 C.F.R. §54.703(c)(3). That the heads of those subordinate entities "run their own 'shops'" (Pet. Br. 50) does not make them principal officers; they are still "inferior" to the department heads that appointed them and supervise their work. The lieutenant may run his own platoon, but he is still subordinate to his own commanding officer.[4]

Ultimately, petitioners ask this Court to abandon *Edmond*'s clear "direction and supervision" test in favor of an amorphous standard that combines factors from *Morrison* v. *Olson*, 487 U.S. 654 (1988), with considerations of petitioners' own invention. As *Edmond* made clear, *Morrison* "did not purport to set forth a definitive test for

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[4] The Appointments Clause's reference to consuls and ambassadors likewise does not help petitioners. Cf. Pet. Br. 47-48. Petitioners have not shown that the Secretary of State has the same comprehensive control over those officers that the SEC has over the Board.

whether an office is 'inferior.'" 520 U.S. at 661. *Edmond*, by contrast, does. While Board members are inferior officers under any plausible standard—including *Morrison*'s—*Edmond* should control.[5]

3. *Petitioners Misapply* Edmond *and Misread the Statute*

a. Petitioners ultimately make only a half-hearted effort to show that Board members are not "directed and supervised" by the SEC. They claim that Board members are not inferior officers because they are removable only for cause. See Pet. Br. 53. But this Court has repeatedly found for-cause removal restrictions consistent with inferior-officer status. See, *e.g.*, *United States* v. *Perkins*, 116 U.S. 483, 485 (1886). "[C]ase law clearly supports the view that 'for cause' limitations on removal power can be compatible with the continuing power and duty to supervise." *Applicability of Executive Order No. 12674 to Personnel of Regional Fishery Management Councils*, 17 Op. Off. Legal Counsel 150, 156 & n.19 (1993). In *Edmond* itself, the superior did not have true at-will removal power; he could not "attempt to influence (by threat of removal or otherwise)" the primary thing

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[5] Petitioners note that *Morrison* relied on the independent counsel's limited tenure and jurisdiction. Pet. Br. 48. But Board members serve only five-year terms, 15 U.S.C. § 7211(e)(5), and regulate only one narrow subject-matter: public-company auditing, a mere subset of the SEC's broader jurisdiction. Any differences in tenure and jurisdiction, moreover, pale compared to the differences in oversight. The independent counsel had "'independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice'" without the Attorney General's permission—including indicting and trying cases—and was required to comply with Department policies only "to the extent possible." *Morrison*, 487 U.S. at 671-672. The Board, by contrast, cannot take any action except as the SEC chooses to allow, and must comply with *all* SEC rules. See pp. 15-18, *supra*; p. 22, *infra*.

the coast guard judges did—decide "the outcome of individual proceedings." 520 U.S. at 664. Indeed, an officer's lower grade has traditionally been thought to *strengthen*, not diminish, the case for civil-service or other tenure protections. See, *e.g.*, *Rutan* v. *Republican Party*, 497 U.S. 62, 74 (1990). For that reason, even *Myers* recognized that department-head-appointed inferior officers "could be entirely removed from politics" by granting them such protections. 272 U.S. at 173-174; see also 3 J. Story, *Commentaries on the Constitution of the United States* §§ 1531-1538, at 388-397 (1833).

The SEC's broad for-cause removal power under Sarbanes-Oxley is not limited to "true miscreants." Pet. Br. 40. The SEC can remove Board members for *any* failure to enforce the Act "without reasonable justification or excuse." 15 U.S.C. § 7217(d)(3)(C). The SEC can also remove Board members for "willful[ ]" violations or abuses of authority. *Id.* § 7217(d)(3)(A)-(B). "[W]illfulness" in the securities context requires only volitional conduct, not knowing violation of the law. See *Wonsover* v. *SEC*, 205 F.3d 408, 413-415 (D.C. Cir. 2000).

Besides, while "[t]he power to remove officers * * * is *a* powerful tool for control," it is not the *only* such tool. See *Edmond*, 520 U.S. at 664 (emphasis added). U.S. Attorneys are inferior officers because of the Attorney General's "broad array of supervisory powers," even though the Attorney General has no formal power to remove them *at all*. *United States* v. *Hilario*, 218 F.3d 19, 25-26 (1st Cir. 2000). The SEC's supervisory powers are even broader: No Board rule or sanction takes effect except as the SEC chooses to allow. The SEC can modify rules and sanctions as it sees fit; the SEC appoints the Board's members and controls its budget; and the SEC can monitor the Board's operations and rescind its enforcement

authority. See pp. 15-18, *supra*. Indeed, the SEC has powers equivalent to at-will removal authority. See p. 46, *infra*. But even if it did not, the SEC would still have ample means to direct and supervise the Board.

b. Focusing on only a subset of the Board's functions, petitioners insist that Board inspections, investigations, and disciplinary proceedings are "subject to no SEC oversight at all." Pet. Br. 53. But that is not true. The SEC not only can review any inspection reports or sanctions that result. 15 U.S.C. §§ 7214(h), 7217(c). It also controls the Board's enforcement functions because the Board must conduct them according to SEC-approved rules that the SEC can modify at any time. See *id.* §§ 7214(c), 7215(a), 7217(b). The SEC can also promulgate its own rules in furtherance of that authority. See *id.* § 7202(a). It can use its reporting and examination power to monitor the Board's operations, *id.* § 7217(a), and in fact does so: "As part of the Commission's oversight of the PCAOB, the Commission staff inspects aspects of the PCAOB's operations, including its inspection program," to "examine whether the PCAOB inspections of audit firms have been effective." *SEC Announces Next Steps for Sarbanes-Oxley Implementation*, Press Release No. 2006-75 (May 17, 2006), http://www.sec.gov/news/press/2006/2006-75.htm. The SEC has also conditioned budget approval on the Board's ongoing submission of information regarding its inspections. *Order Approving PCAOB Budget*, 73 Fed. Reg. 78,861, 78,862 (Dec. 23, 2008). And it can remove Board members for any unreasonable failure to investigate or impose sanctions. See 15 U.S.C. § 7217(d)(3)(C).

Critically, Section 7217(d)(1)—a provision petitioners fail to cite—authorizes the SEC to "relieve the Board of *any responsibility* to enforce compliance" with the Act

whenever doing so is "consistent with the public interest, the protection of investors, and the other purposes of th[e] Act and the securities laws." 15 U.S.C. §7217(d)(1) (emphasis added).[6] The SEC can thus rescind all, or any part, of the Board's investigative and disciplinary power at any time. The SEC also has independent authority to investigate and sanction violations, and can thus reassign rescinded functions to its own staff. See *id.* §§78u(a)(1), 7202(b)(1). Because the SEC controls Board members' salaries, moreover, it can revoke their compensation upon rescinding their authority (by revising the Board's budget or amending its bylaws). See *id.* §§7201(13), 7217(b)(5), 7219(b).

The SEC can also impose rules enabling even more direct control. As the court of appeals recognized, because the SEC controls the rules governing the Board's enforcement functions, it can "modify the Board's investigative authority as it sees fit." Pet. App. 19a. It could "mandate that all decisions regarding investigation * * * be approved by the Commission," empower itself to "'affirmatively command' an investigation," or otherwise "micromanag[e]" the Board. *Id.* at 19a-20a & n.6. Any refusal to follow the SEC's directives would be grounds for removal. See 15 U.S.C. §§7201(15), 7217(d)(3)(A) (allowing removal for any "willful[ ] violat[ion] * * * [of] the rules of the Board, or the securities laws," including SEC rules).

Petitioners claim those control mechanisms are inadequate because they are "unexercised." Pet. Br. 56 (emphasis omitted). Oversight powers, however, enable control by their existence, not just their exercise. For ex-

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[6] Although the SEC must exercise that power "by rule," 15 U.S.C. §7217(d)(1), it can forgo notice and comment if necessary in the "public interest," 5 U.S.C. §553(b)(B).

ample, an officer's "'presumed desire to avoid removal'" creates a "'here-and-now subservience'" even if the superior never exercises the removal power. *Bowsher*, 478 U.S. at 727 n.5 (quoting *Synar* v. *United States*, 626 F. Supp. 1374, 1392 (D.D.C. 1986)). Merely keeping the power "*in terrorem* over the heads of the officers * * * stimulate[s] [them] to do their duty to the satisfaction of the principal." 1 Annals of Cong. 495 (Gales ed., 1834) (Ames). Likewise here, the SEC need not rescind the Board's authority and salaries or impose a rule to micromanage the Board. The mere threat to do either would suffice. Indeed, the Board's mere awareness of the SEC's powers ensures day-to-day compliance. Petitioners cannot challenge the Act's constitutionality merely because they disagree with how the SEC has chosen to exercise its oversight powers (particularly in this facial challenge).

For the same reasons, petitioners err in suggesting that the Act authorizes only "after-the-fact" or "passive" review. Pet. Br. 54-55. Even assuming inferior officers must be subject to ongoing day-to-day supervision, the SEC has that authority: It can use its rescission or rule-modification powers to compel compliance at any time. Even the SEC's nominally "passive" review powers enable day-to-day control. Because Board rulemaking is conducted in the shadow of the SEC's ultimate review, for example, the SEC can—and does—manage development of Board rules simply by indicating what it will or will not approve. "To facilitate the Commission's oversight responsibilities in this area, the [SEC] staff meets regularly with the PCAOB staff to discuss and provide input on the PCAOB's standard-setting activities." SEC Staff Speech, *Considering Audit Regulation Under SOX* (Dec. 10, 2007), http://www.sec.gov/news/speech/2007/

spch121007zvp.htm. Because "the SEC is [the Board's] oversight body," rulemaking can involve "frequent—if not daily—dialogue with the SEC at all levels of both organizations." *Chairman Mark Olson's Remarks on the Proposed New Standard Concerning the Audit of Internal Control* 1-2 (Dec. 19, 2006), http://www.pcaob.org/Rules/Docket_021/2006-12-19_Statement_Olson.pdf.

Petitioners insist that *Morrison* proves that the SEC's rescission and rule-modification powers do not enable supervision. In *Morrison*, they urge, the D.C. Circuit's Special Division could "terminate" an independent counsel's office, yet the Court held that the Division lacked ability to "supervise" the counsel. Pet. Br. 55-56. *Morrison*, however, undermines petitioners' claim. *Morrison* recognized that judicial supervision of an executive officer would raise substantial separation-of-powers concerns. See 487 U.S. at 682. Consequently, it construed the statute at issue narrowly to allow the Special Division to "terminate" an independent counsel's office only *after* completion of his duties. *Id.* at 682-683. *That* is why the Court refused to equate the Division's termination power with "the power to *remove* the counsel while an investigation or court proceeding is still underway." *Id.* at 682. The SEC, by contrast, can rescind or modify the Board's authority at any time. *Morrison* makes clear that those ever-present powers matter precisely because they *do* enable supervision. See *id.* at 680-682.[7]

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[7] Petitioners compare the SEC's rescission and rule-modification powers to Congress's power to amend a statute. Pet. Br. 55. But Congress's amendment power *is* an effective means of control; it is constitutional because Congress exercises it *through legislation*. See p. 53, *infra*. That some of the SEC's control mechanisms can be analogized to powers exercised by a powerful coordinate branch of government merely underscores their potency.

c. Petitioners attempt to construe the Act narrowly to minimize the SEC's control. But they misread the statute and ignore basic principles of constitutional avoidance. Petitioners essentially assume that Congress intended the Board to be independent from the SEC and then distort or ignore the statutory provisions and legislative history that undermine that claim. The SEC's pervasive control mechanisms under the Act are impossible to reconcile with petitioners' theory of independence. Congress made the Board independent from the accounting profession, not the SEC. Congress made the Board *separate* from the SEC. But it did so for practical reasons such as salaries and focus, not to free the Board from SEC control. See pp. 3-4, *supra*.

Petitioners thus err in asserting in their petition that the only way the SEC may limit Board functions is as a sanction for Board misconduct pursuant to Section 7217(d)(2). Pet. 36-37. Petitioners do not reassert that claim in their brief, and with reason: The fact that Congress authorized limitations as a disciplinary sanction does not mean it restricted the SEC's broad authority to regulate Board functions under other provisions in the public interest. See *Shurtleff* v. *United States*, 189 U.S. 311, 317-318 (1903). Congress required the Board to conduct inspections, investigations, and disciplinary proceedings pursuant to SEC-approved rules that the SEC can modify as it sees fit. 15 U.S.C. §§7214(c), 7215(a), 7217(b). Congress obviously contemplated that those rules would impose "limitations" on how the Board performs those functions.

The dissent below claimed that the SEC could not promulgate rules requiring the Board to follow its directives because such rules would not be "in furtherance of th[e] Act," and that the SEC's power to amend the

Board's rules was not a "backdoor grant of authority to exercise direction and supervision." Pet. App. 93a-96a. Petitioners do not defend that theory either. The Act unambiguously authorizes the SEC to control Board inspections, investigations, and disciplinary proceedings by amending the Board's rules, and to promulgate its own rules "in furtherance of" that authority. See 15 U.S.C. §§7202(a), 7214(c), 7215(a), 7217(b)(5). A rule requiring the Board to obtain SEC approval before initiating an investigation, or to initiate or terminate an investigation as the SEC may direct, is no less a "rule * * * for the investigation * * * of registered public accounting firms" than any other. *Id.* §7215(a). The Department of Justice uses its rulemaking authority to impose detailed notification, coordination, and approval requirements in certain categories of prosecutions. See, *e.g.*, U.S. Attorney's Manual §§9-2.136 *et seq.*, 9-10.010 *et seq.*; *Delegation of Authority To Publish a U.S. Attorney's Manual*, 41 Fed. Reg. 46,598, 46,598 (Oct. 22, 1976) (citing, *inter alia*, 5 U.S.C. §301). The SEC's authority here is no different.

Such rules would not "destroy the independence * * * Congress sought to ensure." Pet. App. 94a. The "independence" Congress sought was independence from the accounting profession, not the SEC. See pp. 2-4, *supra*. Congress made the Board structurally separate from the SEC because it wanted to create a separately funded entity that was focused *solely* on audit regulation, and because it wanted the Board to pay private-sector salaries. See p. 3, *supra*. Congress did not make the Board independent from the SEC's *control*. Whatever inference one might draw from the for-cause removal restriction in isolation is plainly overcome by the countless other statutory provisions granting the SEC unqualified control. The fleeting mentions of the removal provision in the leg-

islative history merely note the SEC's power to remove for cause as an example of its *control*. See S. Rep. No. 107-205, at 12 (2002); *Senate Hearings* 584 (Coffee).

Petitioners quote Senator Gramm's assertion that the Board would exercise "'massive . . . unchecked power, by design.'" Pet. Br. 2. But Senator Gramm was the bill's "main critic" who "decided at the last minute to vote for it." Cornwell, *U.S. Congress Sends Corporate Reform Bill to Bush*, Reuters News, July 26, 2002; see S. Rep. No. 107-205, at 2, 66-67. The views of legislative opponents are hardly authoritative. See *Bryan* v. *United States*, 524 U.S. 184, 196 (1998). And it is not even clear what Senator Gramm meant—he recognized in the same speech that the Board "me[t] the constitutional test" because "the SEC * * * ha[d] authority over it." See 148 Cong. Rec. 12,120 (2002). The General Accounting Office report that petitioners quote (Pet. Br. 48) likewise states in the same sentence that the Board is "subject to SEC oversight." GAO, *Actions Needed To Improve PCAOB Selection Process* 6 (2002). This Court should not construe the Act's facially broad oversight provisions narrowly to vindicate a nonexistent mandate of 'independence" from the SEC.

Petitioners' effort to manufacture a constitutional violation also ignores the fundamental principle that courts must construe statutes to avoid rather than create constitutional doubt. See *Nw. Austin Mun. Util. Dist. No. 1* v. *Holder*, 129 S. Ct. 2504, 2513 (2009). That canon applies with "especially great" force in separation-of-powers cases. *Pub. Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989). Even if petitioners' countertextual interpretations were plausible in the abstract—and they are not—this Court must adopt any reasonable construction necessary to uphold the Act. *Ibid.* The court of appeals

properly did so. Petitioners urge the Court to do the opposite.

B. The SEC Is a "Department"

Petitioners argue that independent agencies like the SEC are not "departments" capable of appointing their own inferior officers. That claim defies more than 70 years of settled tradition. In 1933, the Attorney General ruled that the independent Civil Service Commission was a "department." *Authority of Civil Service Commission To Appoint a Chief Examiner*, 37 Op. Att'y Gen. 227, 231 (1933). Congress routinely grants independent agencies authority to appoint their subordinates. See *Freytag* v. *Commissioner*, 501 U.S. 868, 918 (1991) (Scalia, J., concurring in judgment). While the majority in *Freytag* declined to address "appointment of an inferior officer by the head of one of the principal agencies, such as * * * the Securities and Exchange Commission," 501 U.S. at 887 n.4, Justice Scalia's concurrence (joined by Justices O'Connor, Kennedy, and Souter) concluded that "so-called 'independent regulatory agencies'" like the SEC are "departments," *id.* at 918-922. And the Executive Branch has reaffirmed that Congress may "vest the power to appoint inferior officers in the heads of the so-called independent agencies." *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 152-153 (1996).

Petitioners urge that "departments" include only agencies "directly accountable to the President." Pet. Br. 57. But that standard is met here. While independent agencies are sometimes referred to pejoratively as part of a "headless Fourth Branch," cf. *id.* at 59 n.8, "agencies, even 'independent' agencies, are more appropriately considered to be part of the Executive Branch." *Fed. Maritime Comm'n* v. *S.C. State Ports Auth.*, 535 U.S. 743, 773

(2002) (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.); see *Mistretta* v. *United States*, 488 U.S. 361, 424 (1989) (Scalia, J., dissenting) ("[A]n 'independent agency' * * * [is] an agency *within* the Executive Branch * * * ."); 37 Op. Att'y Gen. at 231. The Constitution contemplates only three branches of government, and the SEC is not part of Congress or the judiciary.[8]

The President appoints SEC Commissioners, 15 U.S.C. §78d(a), and can remove them, *MFS Sec. Corp.* v. *SEC*, 380 F.3d 611, 619 (2d Cir. 2004). No statute restricts his removal authority.[9] While Commissioners are customarily understood to be removable only for "'inefficiency, neglect of duty or malfeasance in office,'" *ibid.*, this Court has stated that those terms are "very broad and * * * could sustain removal * * * for any number of actual or perceived transgressions," *Bowsher*, 478 U.S. at 729. Presidents have, in fact, removed independent agency board members for cause, either expressly or by forcing their resignation. See Breger & Edles, *Established by Practice*, 52 Admin. L. Rev. 1111, 1144-1151 & nn.197-198 (2000). The President oversees the SEC in other ways as well.[10] Whatever "degree" of independence

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[8] Petitioners' suggestion that independent agencies could be "'agent[s] of Congress'" (Pet. Br. 20) is irreconcilable with the rule that Congress and its agents may affect private rights only through legislation. See *Metro. Wash. Airports Auth.*, 501 U.S. at 276 (Stevens, J.).

[9] Because the SEC was created in the years between *Myers* and *Humphrey's Executor*, Congress likely believed it lacked authority to restrict removal. See Strauss, *The Place of Agencies in Government*, 84 Colum. L. Rev. 573, 610 & n.147 (1984).

[10] The President appoints the SEC's Chairman from among the five Commissioners, and can remove him at will by appointing a replacement. See Reorganization Plan No. 10, §3, 15 Fed. Reg. 3175, 3175 (May 25, 1950). The Chairman's authority over administrative matters gives the President a means of control. See Strauss, *supra*, at

agencies like the SEC have, see *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1829 (2009) (Breyer, J., dissenting), they are not unaccountable to the President. Petitioners concede that independent agencies are "constitutionally compliant because their commissioners are appointed and removable by the President." Pet. Br. 22. Those presidential powers matter precisely because they ensure accountability.

The SEC is also *directly* accountable to the President. "Departments" include only agencies immediately below the President, not subordinate divisions *within* those departments. *United States* v. *Germaine*, 99 U.S. 508, 511 (1879). The Commissioners answer to the President alone; there is no larger organization of which the SEC is merely a subpart. Petitioners thus err in arguing that the SEC does not "resemble [a] cabinet department[ ]." Pet. Br. 58. The SEC resembles a cabinet department in the respect that matters: It is a standalone executive agency directly accountable to the President. Unlike the highly specialized and relatively small tax court in *Freytag*, moreover, the SEC oversees an important part of the national economy.

Neither precedent nor logic justifies allowing the SEC to exercise far-reaching regulatory powers but denying it the customary executive authority to appoint its own subordinates. "It makes no sense to create a system in which the inferior officers of [an agency] * * * must be appointed by the President, the courts of law, or the 'Secretary of Something Else.'" *Freytag*, 501 U.S. at 919-920

590-591; p. 34, *infra*. The President also exercises various degrees of oversight under other provisions. See, *e.g.*, Exec. Order No. 12,866, § 4(c), 58 Fed. Reg. 51,735, 51,738 (Oct. 4, 1993); 44 U.S.C. §§ 3502(1), 3507(a), (f); cf. Strauss, *supra*, at 592-593, 646.

(Scalia, J., concurring in judgment). Yet that is what petitioners advocate.

C. The Commission Is the SEC's "Head"

Petitioners assert that Congress cannot lodge appointment power in the Commission because the Chairman, not the Commission, is the SEC's "head." Even apart from the district court's holding that petitioners lack standing to raise that claim, see Pet. App. 114a; J.A. 74-75, the argument fails. For as long as independent agencies have been deemed "departments," the multimember commissions in charge of them have been their "heads." The Attorney General ruled in 1933 that "the three Commissioners, who constitute the [Civil Service] Commission, are the 'head of [the] Department.'" 37 Op. Att'y Gen. at 231. Congress has declared that "the head of an agency [may] be * * * a commission or board with more than one member." 5 U.S.C. §904. And "many independent regulatory agencies are headed by groups with no apparent constitutional infirmity." *Silver* v. *U.S. Postal Serv.*, 951 F.2d 1033, 1044 n.3 (9th Cir. 1991) (O'Scannlain, J., dissenting).[11]

The Commission exercises the SEC's important powers as a collective body. The Commission, not the Chairman, promulgates rules. 15 U.S.C. §78w(a)(1). The Commission, not the Chairman, authorizes enforcement proceedings. *Id.* §78u(d). The Commission, not the Chairman, reviews sanctions. *Id.* §78d-1(b). And the Commission, not the Chairman, supervises SROs. *Id.*

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[11] That dictionaries define "head" as "'*one* who has the *first* rank or place'" (Pet. Br. 60) does not resolve whether the "one" must be one person rather than one committee. And petitioners' historical authorities relate to the decision to vest appointment of principal officers in a single *President*. See *ibid.* The Framers entrenched *that* preference in constitutional text.

§ 78s. The SEC, moreover, is surely in the best position to know who its own head is. The United States has argued throughout this litigation that the Commission is the SEC's head. See, *e.g.*, Gov't C.A. Br. 33.

Petitioners contend that President Truman made the Chairman the SEC's "head" when he issued Reorganization Plan No. 10 in 1950. Pet. Br. 60-61. But that plan merely transferred to the Chairman administrative duties concerning "day-to-day direction and internal administration"; "the substantive aspects of regulation—that is, the determination of policies, the formulation and issuance of rules, and the adjudication of cases * * * [we]re left in the * * * commission as a whole." *Special Message to the Congress Summarizing the New Reorganization Plans*, 1950 Pub. Papers 195, 197 (Mar. 13, 1950). "The fact that * * * the commissions retain[ed] all substantive responsibilities deserves special emphasis." *Special Message to the Congress Transmitting Reorganization Plans 1 Through 13 of 1950*, 1950 Pub. Papers 199, 202 (Mar. 13, 1950). The plan itself provided that "the Chairman shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make." Reorganization Plan No. 10, § 1(b)(1), 15 Fed. Reg. 3175, 3175 (May 25, 1950).

The Reorganization Act, moreover, required any new agency "head" created by a plan to be either a civil-service or Senate-confirmed position. 5 U.S.C. § 904. The Chairman's position is neither. See p. 31 n.10, *supra*. Petitioners' argument thus rests on the implausible premise that President Truman made the Chairman the SEC's head in violation of the Act's express requirements.

That the SEC's website describes the Chairman as its "'top executive'" (Pet. Br. 61) proves nothing. As the Office of Legal Counsel has explained, even if a board's chairman is designated "Chief Executive Officer," he exercises authority "subject to [b]oard oversight," and the board has "ultimate authority to manage [agency] business." *Division of Power and Responsibilities Between the Chairperson of the Chemical Safety and Hazard Investigation Board and the Board as a Whole*, Op. Off. Legal Counsel, 2000 WL 33952881, at *2, *5 (June 26, 2000).

Petitioners suggest that recognizing the Commission to be the SEC's "head" would imperil the SEC's division heads and general counsel because those individuals "were appointed by the Chairman *alone*." Pet. Br. 62. But those staff members are not appointed "by the Chairman *alone*." Under Reorganization Plan No. 10, "[t]he appointment[s] by the Chairman of the heads of major administrative units under the Commission *[are] subject to the approval of the Commission*." § 1(b)(2), 15 Fed. Reg. at 3175 (emphasis added). That Commission approval is sufficient to render them Commission appointees for Appointments Clause purposes. See *United States* v. *Hartwell*, 73 U.S. 385, 393-394 (1868); *United States* v. *Smith*, 124 U.S. 525, 532-533 (1888); *Germaine*, 99 U.S. at 511.

II. Sarbanes-Oxley Does Not Violate Separation Of Powers

This Court has repeatedly and properly emphasized the indispensable role of separation of powers in preserving individual liberty. Petitioners appeal to those principles in the abstract but ignore two centuries of precedent governing the precise question at hand. Petitioners claim that Congress violated separation-of-powers principles

by giving the SEC rather than the President authority to remove Board members. But the settled rule since the Framing has been that, when Congress grants a department head authority to appoint its own subordinates, Congress can also grant the department head sole authority to remove them. Congress followed that rule to the letter in Sarbanes-Oxley by granting the SEC sole authority to appoint and remove its new subordinates. That traditional arrangement does not undermine the President's "executive Power" or duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§1, 3. It merely requires him to supervise inferior officers the same way he normally supervises such officers—by supervising the principal officers to whom they report. Petitioners attempt to carve out from that settled rule a novel exception for independent agencies, but their exception has no foundation in precedent, practice, or logic.

Petitioners complain that the standards for removing and supervising Board members are too restrictive. But that claim has no merit either. The Act grants the SEC expansive control mechanisms that are equivalent to at-will removal power, and the President has the same authority over the SEC here as elsewhere. The Act thus does not diminish the President's control in any way.

A. Congress Can Grant Department Heads Sole Authority To Remove the Subordinates They Appoint

1. Petitioners' premise that the President must have authority to remove all executive officers—even inferior officers appointed by department heads—defies 170 years of precedent. In *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839), this Court held that "the power of removal [i]s incident to the power of appointment," upholding a district court's removal of a clerk it had appointed.

Id. at 258-262. That same rule, the Court explained, governs executive officers as well: "[P]ower is given to the secretary, to appoint all necessary clerks; and although no power to remove is expressly given, yet there can be no doubt, that these clerks hold their office at the will and discretion of the head of the department." *Id.* at 259 (citation omitted). The Court made clear that, when the department head appoints, *only* the department head—and *not* the President—can remove: "*[T]he President has certainly no power to remove.*" *Id.* at 260 (emphasis added). In short, "all inferior officers * * * hold their office at the discretion of the appointing power." *Ibid.*[12]

That rule traces back to the Republic's earliest days. In the legislative Decision of 1789 (which petitioners invoke as "'weighty evidence of the Constitution's meaning,'" Pet. Br. 28), speakers on both sides of the debate acknowledged more than 20 times that the power to remove follows the power to appoint.[13] The issue there was whether a *presidentially appointed* principal officer could be removed by the President alone or only with the Senate's consent. 1 Annals of Cong. 473. "It was agreed * * * [that] the power of appointment carried with it the

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[12] At one point the Court prefaced its holding with the phrase "[i]n the absence of all constitutional provision, or statutory regulation." 38 U.S. at 259. That comment followed the observation that Article III grants judges life tenure, and was directed to such "express limitation[s] in the Constitution." See *id.* at 258-259. By contrast, when the Court addressed inferior executive officers appointed by department heads, it made clear that the President "has certainly no power to remove" them. *Id.* at 260.

[13] See 1 Annals of Cong. 388-389, 396-397 (Bland); *id.* at 389, 508, 577 (Jackson); *id.* at 391, 473, 485, 537-538 (White); *id.* at 393, 584 (Sylvester); *id.* at 395-396, 596 (Gerry); *id.* at 396, 566 (Livermore); *id.* at 484 (Vining); *id.* at 502-503 (Lawrence); *id.* at 510-511 (Sherman); *id.* at 511-512 (Stone); *id.* at 526 (Benson); *id.* at 542 (Sedgwick); *id.* at 548 (Boudinot); *id.* at 561 (Ames). But see, *e.g.*, *id.* at 579 (Baldwin).

power of removal"; "the real point which was considered and decided" was whether the Senate's authority to confirm nominees made the Senate part of the "appointing" power for removal-follows-appointment purposes. *Myers*, 272 U.S. at 119. Congress concluded that it did not, so that the President had sole power to remove his appointees. *Ibid.* By the same logic, where a *department head* appoints, only the *department head* can remove. Thus, when Congress granted the Postmaster General authority to appoint subordinates shortly after the Framing, it was understood that he also had "sole and exclusive authority" to remove them. 3 Story, *supra*, § 1530, at 387.

In *United States* v. *Perkins*, 116 U.S. 483 (1886), this Court held that Congress's authority to vest appointment in a department head implied a more general authority to regulate removal. "'We have no doubt that when congress, by law, vests the appointment of inferior officers in the heads of departments, it may *limit and restrict the power of removal as it deems best for the public interest.*'" *Id.* at 485 (emphasis added). "'The constitutional authority in congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as congress may enact in relation to the officers so appointed.'" *Ibid.* Justice Story stated that same rule: "As far as congress constitutionally possess[es] the power to * * * delegate the appointment of 'inferior officers,' so far they may prescribe the term of office, the manner in which, and the persons by whom, the removal * * * shall be made." 3 Story, *supra*, § 1531, at 388. That congressional authority necessarily encompasses authority to lodge removal power in the department head that made the appointment.

Myers expressly reaffirmed *Hennen*, holding that "as a constitutional principle the power of appointment carrie[s] with it the power of removal." 272 U.S. at 119. *Myers* also cited *Perkins* for the proposition that "Congress [has] the power to limit and regulate removal of * * * inferior officers by heads of departments when it exercises its constitutional power to lodge the power of appointment with them." *Id.* at 127, see also *id.* at 160-161. *Myers* invalidated a restriction on removal of a *presidentially appointed* inferior officer because it deprived the President of authority to remove an officer *he appointed*. "[S]o long as Congress does *not* exercise th[e] power" to vest appointment in a department head, the Court explained, "the power of removal must remain * * * with the President." *Id.* at 161 (emphasis added).

This Court has reaffirmed *Hennen*'s removal-follows-appointment rule more than a half-dozen other times.[14] The courts of appeals follow it. See, *e.g.*, *Nat'l Treasury Employees Union* v. *Reagan*, 663 F.2d 239, 247-248 (D.C. Cir. 1981). And it is followed in practice: When President Nixon sought to terminate the Watergate investigation, he understood he could only direct the Attorney General to fire the Special Prosecutor; he could not fire the Prosecutor himself. See *Nader* v. *Bork*, 366 F. Supp. 104, 107 (D.D.C. 1973). OLC agrees: "[I]nferior officers appointed by a department head [a]re not removable by the President * * * but by the secretary who appointed

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[14] See *Sampson* v. *Murray*, 415 U.S. 61, 70 n.17 (1974); *Burnap* v. *United States*, 252 U.S. 512, 515 (1920); *Shurtleff* v. *United States*, 189 U.S. 311, 316 (1903); *Reagan* v. *United States*, 182 U.S. 419, 424 (1901); *Keim* v. *United States*, 177 U.S. 290, 293-294 (1900); *Parsons* v. *United States*, 167 U.S. 324, 331 (1897); *United States* v. *Allred*, 155 U.S. 591, 594 (1895).

them," and "*Hennen* [and] *Perkins* * * * remain good law." 20 Op. Off. Legal Counsel at 166.

2. Petitioners respond to that longstanding precedent by ignoring it. They do not cite *Hennen* at all, and cite *Perkins* only in a parenthetical in their description of the decision below. Pet. Br. 6. Instead, petitioners urge that the President must have power to remove executive officers because Article II vests him with the "executive Power" and charges him to "take Care that the Laws be faithfully executed." See Pet. Br. 25-28. But those separation-of-powers principles in no way conflict with *Hennen*'s removal-follows-appointment rule. The "heads of departments" that can appoint and remove inferior executive officers pursuant to *Hennen* serve directly under the President and are accountable to him for their supervisory decisions no less than for any other decisions. See pp. 30-33, *supra*; pp. 50-51, *infra*; *Reagan*, 663 F.2d at 247-248. The removal-follows-appointment rule thus does not deny the President authority to ensure faithful execution of the laws. It merely requires him to supervise inferior officers in traditional "chain of command" fashion, by supervising the principal officers to whom they report.

As the Attorney General explained in 1823, if "the postmaster should make a corrupt appointment, * * * the power of correction which the President holds is not to supersede such appointment by one made by himself." *The President and Accounting Offices*, 1 Op. Att'y Gen. 624, 626 (1823). "He is to take care, in such a case, that the Postmaster General be punished * * * : he has power to remove him—to appoint a successor; *and through the medium of such successor, and by his instrumentality*, to remove the deputy, and to see that his place be honestly supplied." *Ibid.* (emphasis added).

Contrary to petitioners' suggestion in the court of appeals, nothing in *Morrison* undermines *Hennen* or *Perkins*. *Morrison* specifically reaffirmed *Perkins*. See 487 U.S. at 689-690 nn.27, 29. The Court observed that it did not confront a situation in which "the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws." *Id.* at 692. But the Court did not suggest that the President must be able to supervise inferior officers directly rather than through their superiors. *Hennen*'s rule preserves a "means for the President to ensure the 'faithful execution' of the laws" because the President supervises the department head responsible for the subordinate. Besides, the notion that one ambiguous sentence in *Morrison*—an opinion *upholding* the Ethics in Government Act—overruled two centuries of settled law is fanciful.[15]

3. Apparently recognizing the insurmountable obstacles to their original theory that the President *himself* must have power to remove all inferior executive officers, see Pet. Dist. Ct. Br. 14-18, petitioners suggest that Congress can vest removal power in a department head, but

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[15] Petitioners also relied below on *Morrison*'s statement that *Hennen* was "'not intended to define the constitutional power of Congress.'" 487 U.S. at 673-674. But that comment related to a different issue: the permissibility of inter-branch appointments. See *ibid.* *Hennen* assumed that principal officers would appoint only their *own* subordinates, 38 U.S. at 257-258, a view the Court rejected in *Ex parte Siebold*, 100 U.S. 371, 397-398 (1880). But that post-*Hennen expansion* of Congress's authority hardly supports petitioners' position. And while courts have not traditionally applied *Hennen*'s removal-follows-appointment rule to inter-branch appointments—an application that would raise serious constitutional questions, cf. *Morrison*, 487 U.S. at 682-683—that does not diminish *Hennen*'s force in the traditional context that case addressed: a principal officer's appointment of his *own* subordinates.

only if he is a presidential "alter ego" removable at will. See Pet. Br. 25-26 n.3. Petitioners thus propose a specially gerrymandered rule that, while the President must supervise inferior officers through their superiors in all other contexts, a different rule of direct presidential supervision applies to inferior officers in independent agencies.

That proposed exception ignores the reasoning of this Court's cases. *Hennen*'s rationale for the rule that department heads have sole authority to remove the subordinates they appoint—and the rationale of every case since—is that the power to remove follows the power to appoint. It is *not* that department heads are presidential alter egos. See pp. 36-40, *supra*. That removal-follows-appointment rationale does not depend on whether the department head is removable for cause or at will. The department head must be sufficiently accountable to the President that the department is, in fact, a "department" capable of appointing inferior officers. See pp. 30-33, *supra*. But neither the Constitution nor precedent supports a further requirement that the department head be removable at will. Petitioners do not cite a single case ever suggesting such a requirement, even though independent agencies have been around for over 120 years. See Interstate Commerce Act, ch. 104, § 11, 24 Stat. 379, 383 (1887).[16]

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[16] Petitioners cite *Myers*, Pet. Br. 25 n.3, but that case nowhere suggests that *Hennen*'s removal-follows-appointment rule depends on whether a department head is an "alter ego." See 272 U.S. at 119. It merely refers to department heads as "alter ego[s]" in an unrelated discussion 14 pages later. See *id.* at 133. And even that unrelated discussion does not say that department heads are alter egos generally—only that they are alter egos when engaged in "political" functions such as foreign affairs as opposed to statutorily assigned administrative functions of the sort at issue here. See *id.* at 132-135.

Congress has repeatedly lodged removal power—both at-will *and for-cause*—in the heads of independent agencies. The Commodity Futures Trading Commission appoints a General Counsel who "serve[s] at the pleasure of the Commission." 7 U.S.C. §2(a)(2)(A), (4). The National Archives and Records Administration's Deputy Archivist is "appointed by and * * * serve[s] at the pleasure of the Archivist." 44 U.S.C. §§2102, 2103(c). The Consumer Product Safety Commission appoints and removes several inferior officers. 15 U.S.C. §2053(a), (g)(1)(A), (B)(ii). The Postal Service's Inspector General is appointed by, and removable only for cause by, the Postal Service's Governors, who are removable only for cause. 39 U.S.C. §202(a)(1), (e). Two of the three members of the Foreign Service Labor Relations Board are appointed by and removable only for cause by the Federal Labor Relations Authority's Chairman, who is removable only for cause. 5 U.S.C. §7104(b); 22 U.S.C. §4106(a), (e). The Social Security Administration's Chief Actuary is removable only for cause, and is "appointed by, and in direct line of authority to, the Commissioner," who is removable only for cause. 42 U.S.C. §902(a)(3), (c)(1). The Municipal Securities Rulemaking Board's initial members were appointed by the SEC, which could remove them only for cause under a standard similar to the one governing Board members. 15 U.S.C. §78o-4(b)(1), (c)(8). Government corporations like Amtrak and the Tennessee Valley Authority appoint and remove inferior officers. 16 U.S.C. §831a(h)(1), (3); 49 U.S.C. §24303(a). And many administrative law judges in independent agencies are inferior officers who can be removed by their agency heads only for cause. 5 U.S.C. §7521; see, *e.g.*, 30 U.S.C. §823(b), (d)(1), (2)(A)(ii)(I); *Freytag*, 501 U.S. at 880-882; cf. *Landry* v. *FDIC*, 204 F.3d 1125, 1132-1134 (D.C. Cir. 2000). That the political branches have

long seen no distinction between independent and cabinet agencies in this regard weighs heavily against creating such a distinction now. See *Freytag*, 501 U.S. at 918 (Scalia, J., concurring in judgment).[17]

Petitioners premise their alter-ego theory on the claim that vesting removal power in a presidential alter ego is no different from vesting it in the President himself. Pet. Br. 25-26 n.3. But even a principal officer removable at will may refuse to carry out an order to fire a subordinate. See, *e.g.*, *Nader*, 366 F. Supp. at 107. The President can remove the principal officer for refusing to comply, but he may have to obtain Senate confirmation for a replacement willing to carry out his bidding. That Senate confirmation requirement reflects a deliberate design: The President's power to remove does not mean he has free rein in appointing successors. See *The Federalist No. 76* (Hamilton); *Weiss* v. *United States*, 510 U.S. 163, 184-186 (1994) (Souter, J., concurring). And while Congress has authorized "acting" department heads in some cases, see 5 U.S.C. §§3345, 3349c, it can constitutionally prohibit them, see 20 Op. Off. Legal Counsel at 163-164; *Authority of the President To Remove the Staff Director of the Civil Rights Commission and Appoint an Acting Staff Director*, Op. Off. Legal Counsel, 2001 WL 34815748, at *2 (Mar. 30, 2001).

Petitioners essentially seek to do what members of this Court have deemed a "fruitless endeavor"—"adjust[] the remainder of the Constitution to compensate for *Humphrey's Executor*." *Freytag*, 501 U.S. at 921 (Scalia, J., concurring in judgment). Under this Court's prece-

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[17] Statutes typically do not expressly deny the President removal authority; they do so implicitly by lodging the removal power elsewhere. Sarbanes-Oxley is written the same way. See 15 U.S.C. §§7211(e)(6), 7217(d)(3).

dents, independent agencies exercise far-reaching executive powers by promulgating rules, investigating violations, and adjudicating disputes nationwide. It makes no sense to give them *those* executive powers but deny them the customary and relatively pedestrian authority to appoint, supervise, and remove the subordinates who assist them in those functions. Petitioners effectively argue that, although the President supervises inferior officers in all other departments—diplomats in the State Department, prosecutors in the Department of Justice—through their superiors in traditional "chain of command" fashion, for independent agencies he is constitutionally entitled to remove inferior officers out from under the principal officers that supervise them. If that is not "adjusting the remainder of the Constitution to compensate for *Humphrey's Executor*," nothing is.

B. The Act Does Not Impermissibly Restrict the President's or the SEC's Authority

Sarbanes-Oxley does not unconstitutionally restrict the President's traditional chain-of-command authority. The SEC controls each and every exercise of the Board's authority. And the President has constitutionally sufficient control over the SEC. Indeed, the Act does not diminish the President's authority over the SEC in the slightest.

1. Sarbanes-Oxley does not merely prevent the Board's actions from having any effect except as the SEC chooses to allow. See pp. 15-18, *supra*. Nor does it merely grant the SEC broad for-cause removal power together with plenary control over the Board's regulatory functions and budget. See *ibid.*; p. 22, *supra*. It also grants the SEC multiple powers that are equivalent to at-will removal authority.

First, at any time, based on a mere public-interest finding, the SEC can strip Board members of any or all enforcement responsibilities and reassign those functions to its own staff. See pp. 23-24, *supra*. That unqualified power to abolish an officer's authority is equivalent to at-will removal power. In *Morrison*, for example, Justice Scalia contrasted the independent counsel with the Watergate Special Prosecutor on the ground that "the Attorney General could have removed [the Special Prosecutor] at any time, *if by no other means than amending or revoking the regulation defining his authority*." 487 U.S. at 721 (Scalia, J., dissenting) (emphasis added); see also *United States* v. *Libby*, 429 F. Supp. 2d 27, 44 (D.D.C. 2006) (special counsel was "essentially removable at will" because "the Deputy Attorney General * * * has complete discretion to take [his] authority away"); cf. *In re Sealed Case*, 829 F.2d 50, 56-57 & n.34 (D.C. Cir. 1987); 20 Op. Off. Legal Counsel at 171. The Board likewise exercises executive authority only as the SEC chooses to allow. The SEC, moreover, can revoke Board members' salaries upon rescinding their authority. See p. 24, *supra*. Those combined powers are plainly equivalent to at-will removal authority. A threat to revoke an officer's job responsibilities and paycheck is no less effective in ensuring day-to-day compliance than a threat to remove him from office.

The SEC can also micromanage the Board by imposing rules that require the Board to follow its directives, and it can remove any Board member who refuses to comply. See pp. 23-24, *supra*. That power—to instruct an inferior officer and then remove the inferior for refusing to comply—is also just as potent as at-will removal power in ensuring control. See *Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting).

Rather than address those potent control mechanisms, petitioners urge the Court to consider the Act's for-cause restrictions on formal removal in isolation. Pet. Br. 39-41. But that makes no sense. The Constitution vests the President with the "executive Power" and charges him to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 1, 3. Removal power is a means to those ends. See, *e.g.*, *Myers*, 272 U.S. at 135. The Constitution does not require that "'every officer * * * be removable * * * at will'"; it requires only "control over all exercises of [the officer's] executive power." *Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting); see also *id.* at 689-690 (majority opinion). Sarbanes-Oxley provides mechanisms that ensure that "control" as effectively as formal at-will removal power would. The Board cannot exercise any executive authority free of the SEC's control.

Quoting *Bowsher*, petitioners assert that "removal is key because '[o]nce an officer is appointed, it is only the authority that can remove him . . . that he must fear and, in the performance of his functions, obey.'" Pet. Br. 27 (quoting 478 U.S. at 726). But petitioners omit the phrase "and not the authority that appointed him." 478 U.S. at 726. *Bowsher* was merely observing that removal power, unlike appointment power, is a tool for ongoing control—not that there are *no* effective alternatives. Petitioners also rely on *Morrison*. Pet. Br. 38-39. But *Morrison* noted only that a statute can violate separation of powers for two reasons—because its removal restrictions *plus other limitations* on oversight impermissibly interfere with the President's functions; or because the removal restrictions, even apart from other *limitations*, have that effect. See 487 U.S. at 685. *Morrison* did not suggest that, in analyzing a removal restriction, courts

must ignore equivalent mechanisms of oversight and control.

Under *Perkins*, Congress could have "'limit[ed] and restrict[ed]'" removal of Board members "'as it deem[ed] best for the public interest.'" 116 U.S. at 485. Congress imposed only modest limitations, granting the SEC broad for-cause removal power that falls well within the bounds of the traditional civil-service protections for inferior officers that *Myers* specifically approved. See p. 22, *supra*. But even those modest restrictions are beside the point. Sarbanes-Oxley grants the SEC such pervasive means of control, and empowers the SEC to exercise that control under such broad standards, as to eliminate any conceivable concerns over its removal provision. This case thus presents no opportunity to "extend[ ]" *Humphrey's Executor* or to approve "double for-cause removal provisions." Pet. App. 47a, 66a (dissent). The SEC has as much control over the Board as it would have with at-will removal power. Congress "essentially grant-[ed] [the SEC] at-will removal power over Board functions." Pet. App. 35a.[18]

If the Act's removal restrictions were problematic, moreover, they should be severed. Even absent a sever-

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[18] The dissent below questioned why Congress would grant Board members for-cause removal protection if the SEC had comprehensive and pervasive control. Pet. App. 96a. But removal for cause carries the stigma of having committed misconduct. See *Shurtleff*, 189 U.S. at 317-318. Congress rationally could have granted the SEC unqualified control over the Board's regulatory authority while reserving formal removal for cases of personal misconduct—an approach consistent with Congress's parallel treatment of the SEC's censure power. See 15 U.S.C. § 7217(d)(3). The Act's broad for-cause removal standard, moreover, is not novel. It is the same standard under which the SEC can remove the heads of other entities it supervises. See *id.* § 78s(h)(4); cf. *id.* § 78o-4(c)(8).

ability clause, "the unconstitutional provision[s] [of a statute] must be severed unless the statute created in [their] absence is legislation that Congress would not have enacted." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685-686 (1987). Given the crisis Congress confronted, it is inconceivable that Congress would have declined to enact Sarbanes-Oxley if it could not have included a removal limitation. The removal provision is scarcely mentioned in the legislative history—and even then only as an example of the SEC's *control*. See pp. 28-29, *supra*. In *Myers*, this Court remedied the constitutional defect by striking out the removal restriction, not by abolishing the Post Office. 272 U.S. at 176. If the Court were to find a defect in Sarbanes-Oxley, it should follow the same course here.[19]

2. Sarbanes-Oxley does not diminish the President's authority over the SEC one bit. Petitioners' concession that the SEC itself is constitutional (Pet. Br. 22)—a necessary concession absent a request to overrule *Humphrey's Executor*—thus controls this case. The President has the same control over the SEC's supervision of the Board that he has over any other SEC function. Because the SEC's control over the Board is plenary, the President has the same control as he would have if Congress had lodged the Board's functions in the SEC's own staff. If the President has constitutionally adequate control over the SEC, he has constitutionally adequate control over the Board as well.

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[19] The Court should also follow its usual practice of declaring any adverse decision to be prospective only, to avoid casting doubt on the Board's past actions. See *Buckley* v. *Valeo*, 424 U.S. 1, 142 (1976); *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982).

As explained above, see p. 31, *supra*, the President can remove SEC Commissioners for "'inefficiency, neglect of duty or malfeasance in office,'" *MFS*, 380 F.3d at 619, terms that are "very broad" and "could sustain removal * * * for any number of actual or perceived transgressions," *Bowsher*, 478 U.S. at 729. Such "transgressions" could plainly include neglect in supervising the Board. "A public officer in charge of an office is removable for such inefficiency, neglect of duty, or wrongdoing of subordinates over whom he or she has supervisory control as reasonably indicates inefficiency, neglect of duty, or wrongdoing of the supervising officer herself or himself." 63C Am. Jur. 2d *Public Officers and Employees* § 179, at 610 (1997); see also *Inefficiency or Misconduct of Deputy or Subordinate as Ground for Removal of Public Officer*, 143 A.L.R. 517 (1943). Tenured federal superiors have repeatedly been removed or demoted for inadequately supervising subordinates. See, *e.g.*, *Holder* v. *Dep't of Army*, 670 F.2d 1007, 1009 (Ct. Cl. 1982); *Della Valle* v. *United States*, 231 Ct. Cl. 818, 820, 822-823 (1982). And a superior's neglect to remove an inferior—like any other neglect—could be grounds for the superior's removal: "[T]he power to suspend or discharge * * * subordinates * * * carries with it the correlative duty to vigilantly exercise the power * * *." *Fernelius* v. *Pierce*, 138 P.2d 12, 14 (Cal. 1943); see also *McKinnon* v. *City of Berwyn*, 750 F.2d 1383, 1391 (7th Cir. 1984); *Fiacco* v. *City of Rensselaer*, 783 F.2d 319, 328-332 (2d Cir. 1986).

It therefore is not true (much less "concededly" true) that the President "has no power to influence the Board's appointments, budget, work product or existence." Pet. Br. 33. The SEC has ample means to control the Board, including its control over rules and sanctions, its rescission power, its budget control, and its for-cause removal

power. If the SEC failed to use any of those myriad tools appropriately, the President could remove the Commissioners for neglect in supervising the Board—just as for any other "inefficiency, neglect of duty or malfeasance in office." That the SEC's powers are "discretionary" (Pet. Br. 29) does not mean the SEC is unaccountable for inefficiency, neglect, or malfeasance in their exercise. A trial judge can be reversed for failing to exclude unduly prejudicial evidence even though the relevant rule states only that he "may" exclude it. Fed. R. Evid. 403.

Whatever the precise scope of the President's authority to remove SEC Commissioners, it is capacious enough to enable constitutionally adequate control. It must be, because no statute restricts the President's authority to remove Commissioners. See p. 31 & n.9, *supra*. The rule that courts must construe removal restrictions to avoid constitutional doubt surely applies with even more force to restrictions that are a product of conventional wisdom rather than statutory text.

Petitioners' assertion that Congress impaired the President's authority is also belied by the views of those best positioned to know. President Bush signed the Act into law without separation-of-powers objection (despite identifying other, unrelated concerns, see *Statement on Signing the Sarbanes-Oxley Act of 2002*, 2002 Pub. Papers 1322 (July 30, 2002)), and two consecutive Administrations have now defended it in court. While this Court cannot simply defer to the Executive, see *Freytag*, 501 U.S. at 879-880, the fact that two Presidents have concluded that Sarbanes-Oxley does not undermine their authority surely "detracts from the weight of [the] contention that the Act impermissibly intrudes into * * * the needs of the Executive Branch," *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 441, 449 (1977).

Petitioners raise the specter of a "Criminal Prosecution Board." Pet. Br. 36-38. But this Court has never allowed Congress to vest permanent authority over core executive functions such as criminal prosecution in an independent agency or its subordinates. Even *Morrison* recognized that "some 'purely executive' officials * * * must be removable by the President at will." 487 U.S. at 690. The Board regulates public-company auditing—precisely the sort of technical function Congress could have assigned to the SEC itself. Congress did not violate the Constitution by vesting that authority in a board that is subject to the SEC's comprehensive control instead.

C. Sarbanes-Oxley Does Not Aggrandize Congress's Power

Throughout years of litigation in the courts below, petitioners urged that Sarbanes-Oxley impermissibly limited the President's control. Not once did they argue that it aggrandized Congress's *own* power. That petitioners failed to make that argument before now is no surprise. It is insubstantial.

Sarbanes-Oxley does not grant Congress any power to appoint Board members. Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 118-124 (1976). It does not grant Congress any power to remove Board members. Cf. *Myers*, 272 U.S. at 161. It does not grant Members of Congress any power to veto Board decisions. Cf. *Metro. Wash. Airports Auth.*, 501 U.S. at 276. And it does not grant agents of Congress any power to execute the law. Cf. *Bowsher*, 478 U.S. at 732. The Act does not increase Congress's power in any way. The Act actually *reduces* Congress's control by authorizing the Board to collect support fees outside the congressional appropriations process. See 15 U.S.C. § 7219(d), (i). That provision is hard to square with peti-

tioners' theory that Congress set out to aggrandize its powers.

Petitioners complain that Congress could "reassign the Board's functions to the SEC," "terminate the [Board] and deprive it of funding," or reduce Board members' salaries. Pet. Br. 31. But the Constitution does not prohibit Congress from "control[ling] the execution of [the law] * * * by *passing new legislation*" (subject, of course, to presidential veto). *Bowsher*, 478 U.S. at 733-734 (emphasis added); see *INS* v. *Chadha*, 462 U.S. 919, 955 n.19 (1983). And if petitioners' argument is only that Congress's legitimate controls are more significant in relative terms because the President does not have unfettered authority over the SEC, that is a complaint about *Humphrey's Executor*, not Sarbanes-Oxley. It is at most a reason to construe broadly the President's power to remove Commissioners for neglect in supervising the Board—not a reason to strike down an Act that does not reduce the President's control one iota.

Petitioners also claim that Congress gave itself a "veto power over any Board member's removal" because, to effect a removal, the President would have to fire multiple SEC Commissioners and obtain Senate confirmation for replacements willing to fire Board members. Pet. Br. 31-33. But SEC Commissioners, like all officers, have a "'presumed desire to avoid removal'" regardless of any issues of succession. *Bowsher*, 478 U.S. at 727 n.5; see pp. 24-25, *supra*. The President thus would not have to remove *any* Commissioners to effect a Board member's removal. In all but extraordinary cases, the President's mere *threat* of removal would suffice.

Besides, the Senate cannot "veto" the President's removal of a Commissioner or the SEC's removal of a Board member. It can only refuse to confirm replace-

ment Commissioners—a power the Constitution intentionally grants it. See p. 44, *supra*. The effect of that veto is no different here than elsewhere. If the President determined that the SEC Commissioners were neglecting their duty to regulate the securities markets, he could remove the Commissioners, but the Senate could prevent him from appointing successors. If the President removed a *cabinet secretary* for refusing to remove a subordinate (and Congress had forbidden an "acting" secretary to perform his duties), the Senate could veto a successor. In all those cases, the Senate's confirmation power gives it some measure of authority. But that does not mean the Senate is impermissibly participating in the execution of the laws.

Ultimately, petitioners' "aggrandizement" theories collapse into their limitation-on-presidential-authority theories. Petitioners recognize that this Court has viewed congressional aggrandizement as a more serious threat to separation of powers than mere limitations on executive authority. See Pet. Br. 17. But, unable to show that Congress would actually execute the law—as opposed to merely exercising its *own* constitutionally assigned functions of passing legislation and confirming appointees—petitioners are reduced to arguing that limitations on executive authority necessarily render Congress's own powers more significant by comparison. See Pet. Br. 30-34. That theory renders aggrandizement meaningless as a constitutional category because it transforms *any* restriction on executive authority into an expansion of Congress's own. In any event, Sarbanes-Oxley does not restrict the President's authority in any

way. Petitioners' aggrandizement theory thus fails even on its own misguided terms.[20]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[20] Because Sarbanes-Oxley neither diminishes the President's authority nor aggrandizes Congress's, this Court need not address whether Congress had an "overriding need" to enact the statute. Pet. Br. 34-35. But Congress did have a compelling need to create the Board, and legitimate and important reasons for structuring the Board the way it did. See pp. 2-4, *supra*.

APPENDIX

APPENDIX
RELEVANT STATUTORY PROVISIONS

The Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 7201 *et seq.*, provides in relevant part:

§ 7201. Definitions

In this Act, the following definitions shall apply:

(1) Appropriate State regulatory authority

The term "appropriate State regulatory authority" means the State agency or other authority responsible for the licensure or other regulation of the practice of accounting in the State or States having jurisdiction over a registered public accounting firm or associated person thereof, with respect to the matter in question.

(2) Audit

The term "audit" means an examination of the financial statements of any issuer by an independent public accounting firm in accordance with the rules of the Board or the Commission (or, for the period preceding the adoption of applicable rules of the Board under section 7213 of this title, in accordance with then-applicable generally accepted auditing and related standards for such purposes), for the purpose of expressing an opinion on such statements.

(3) Audit committee

The term "audit committee" means—

(A) a committee (or equivalent body) established by and amongst the board of directors of an issuer for the purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer; and

(B) if no such committee exists with respect to an issuer, the entire board of directors of the issuer.

(4) Audit report

The term "audit report" means a document or other record—

(A) prepared following an audit performed for purposes of compliance by an issuer with the requirements of the securities laws; and

(B) in which a public accounting firm either—

(i) sets forth the opinion of that firm regarding a financial statement, report, or other document; or

(ii) asserts that no such opinion can be expressed.

(5) Board

The term "Board" means the Public Company Accounting Oversight Board established under section 7211 of this title.

(6) Commission

The term "Commission" means the Securities and Exchange Commission.

(7) Issuer

The term "issuer" means an issuer (as defined in section 78c of this title), the securities of which are registered under section 78*l* of this title, or that is required to file reports under section 78o(d) of this title, or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), and that it has not withdrawn.

(8) Non-audit services

The term "non-audit services" means any professional services provided to an issuer by a registered public accounting firm, other than those provided to an issuer in connection with an audit or a review of the financial statements of an issuer.

(9) Person associated with a public accounting firm

(A) In general

The terms "person associated with a public accounting firm" (or with a "registered public accounting firm") and "associated person of a public accounting firm" (or of a "registered public accounting firm") mean any individual proprietor, partner, shareholder, principal, accountant, or other professional employee of a public accounting firm, or any other independent contractor or entity that, in connection with the preparation or issuance of any audit report—

(i) shares in the profits of, or receives compensation in any other form from, that firm; or

(ii) participates as agent or otherwise on behalf of such accounting firm in any activity of that firm.

(B) Exemption authority

The Board may, by rule, exempt persons engaged only in ministerial tasks from the definition in subparagraph (A), to the extent that the Board determines that any such exemption is consistent with the purposes of this Act, the public interest, or the protection of investors.

(10) Professional standards

The term "professional standards" means—

(A) accounting principles that are—

(i) established by the standard setting body described in section 77s(b) of this title, as amended by this Act, or prescribed by the Commission under section 77s(a) of this title or section 78m(b) of this title; and

(ii) relevant to audit reports for particular issuers, or dealt with in the quality control system of a particular registered public accounting firm; and

(B) auditing standards, standards for attestation engagements, quality control policies and procedures, ethical and competency standards, and independence standards (including rules implementing title II) that the Board or the Commission determines—

(i) relate to the preparation or issuance of audit reports for issuers; and

(ii) are established or adopted by the Board under section 7213(a) of this title, or are promulgated as rules of the Commission.

(11) Public accounting firm

The term "public accounting firm" means—

(A) a proprietorship, partnership, incorporated association, corporation, limited liability company, limited liability partnership, or other legal entity that is engaged in the practice of public accounting or preparing or issuing audit reports; and

(B) to the extent so designated by the rules of the Board, any associated person of any entity described in subparagraph (A).

(12) Registered public accounting firm

The term "registered public accounting firm" means a public accounting firm registered with the Board in accordance with this Act.

(13) Rules of the Board

The term "rules of the Board" means the bylaws and rules of the Board (as submitted to, and approved, modified, or amended by the Commission, in accordance with section 7217 of this title), and those stated policies, prac-

tices, and interpretations of the Board that the Commission, by rule, may deem to be rules of the Board, as necessary or appropriate in the public interest or for the protection of investors.

(14) Security

The term "security" has the same meaning as in section 78c(a) of this title.

(15) Securities laws

The term "securities laws" means the provisions of law referred to in section 78c(a)(47) of this title, as amended by this Act, and includes the rules, regulations, and orders issued by the Commission thereunder.

(16) State

The term "State" means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other territory or possession of the United States.

§ 7202. Commission rules and enforcement

(a) Regulatory action

The Commission shall promulgate such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act.

(b) Enforcement

(1) In general

A violation by any person of this Act, any rule or regulation of the Commission issued under this Act, or any rule of the Board shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) or the rules and regulations issued thereunder, consistent with the provisions of this Act, and any such person shall be subject to

the same penalties, and to the same extent, as for a violation of that Act or such rules or regulations.

(2) to (4) Omitted

(c) Effect on Commission authority

Nothing in this Act or the rules of the Board shall be construed to impair or limit—

(1) the authority of the Commission to regulate the accounting profession, accounting firms, or persons associated with such firms for purposes of enforcement of the securities laws;

(2) the authority of the Commission to set standards for accounting or auditing practices or auditor independence, derived from other provisions of the securities laws or the rules or regulations thereunder, for purposes of the preparation and issuance of any audit report, or otherwise under applicable law; or

(3) the ability of the Commission to take, on the initiative of the Commission, legal, administrative, or disciplinary action against any registered public accounting firm or any associated person thereof.

§ 7211. Establishment; administrative provisions

(a) Establishment of Board

There is established the Public Company Accounting Oversight Board, to oversee the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to, and held by and for, public investors. The Board shall be a body corporate, operate as a nonprofit corporation, and have succession until dissolved by an Act of Congress.

(b) Status

The Board shall not be an agency or establishment of the United States Government, and, except as otherwise provided in this Act, shall be subject to, and have all the powers conferred upon a nonprofit corporation by, the District of Columbia Nonprofit Corporation Act. No member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service.

(c) Duties of the Board

The Board shall, subject to action by the Commission under section 7217 of this title, and once a determination is made by the Commission under subsection (d) of this section—

(1) register public accounting firms that prepare audit reports for issuers, in accordance with section 7212 of this title;

(2) establish or adopt, or both, by rule, auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports for issuers, in accordance with section 7213 of this title;

(3) conduct inspections of registered public accounting firms, in accordance with section 7214 of this title and the rules of the Board;

(4) conduct investigations and disciplinary proceedings concerning, and impose appropriate sanctions where justified upon, registered public accounting firms and associated persons of such firms, in accordance with section 7215 of this title;

(5) perform such other duties or functions as the Board (or the Commission, by rule or order) determines are necessary or appropriate to promote high professional standards among, and improve the quality of audit

services offered by, registered public accounting firms and associated persons thereof, or otherwise to carry out this Act, in order to protect investors, or to further the public interest;

(6) enforce compliance with this Act, the rules of the Board, professional standards, and the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, by registered public accounting firms and associated persons thereof; and

(7) set the budget and manage the operations of the Board and the staff of the Board.

(d) Commission determination

The members of the Board shall take such action (including hiring of staff, proposal of rules, and adoption of initial and transitional auditing and other professional standards) as may be necessary or appropriate to enable the Commission to determine, not later than 270 days after July 30, 2002, that the Board is so organized and has the capacity to carry out the requirements of this subchapter, and to enforce compliance with this subchapter by registered public accounting firms and associated persons thereof. The Commission shall be responsible, prior to the appointment of the Board, for the planning for the establishment and administrative transition to the Board's operation.

(e) Board membership

(1) Composition

The Board shall have 5 members, appointed from among prominent individuals of integrity and reputation who have a demonstrated commitment to the interests of investors and the public, and an understanding of the responsibilities for and nature of the financial disclosures

required of issuers under the securities laws and the obligations of accountants with respect to the preparation and issuance of audit reports with respect to such disclosures.

(2) Limitation

Two members, and only 2 members, of the Board shall be or have been certified public accountants pursuant to the laws of 1 or more States, provided that, if 1 of those 2 members is the chairperson, he or she may not have been a practicing certified public accountant for at least 5 years prior to his or her appointment to the Board.

(3) Full-time independent service

Each member of the Board shall serve on a full-time basis, and may not, concurrent with service on the Board, be employed by any other person or engage in any other professional or business activity. No member of the Board may share in any of the profits of, or receive payments from, a public accounting firm (or any other person, as determined by rule of the Commission), other than fixed continuing payments, subject to such conditions as the Commission may impose, under standard arrangements for the retirement of members of public accounting firms.

(4) Appointment of Board members

(A) Initial Board

Not later than 90 days after July 30, 2002, the Commission, after consultation with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury, shall appoint the chairperson and other initial members of the Board, and shall designate a term of service for each.

(B) Vacancies

A vacancy on the Board shall not affect the powers of the Board, but shall be filled in the same manner as provided for appointments under this section.

(5) Term of service

(A) In general

The term of service of each Board member shall be 5 years, and until a successor is appointed, except that—

(i) the terms of office of the initial Board members (other than the chairperson) shall expire in annual increments, 1 on each of the first 4 anniversaries of the initial date of appointment; and

(ii) any Board member appointed to fill a vacancy occurring before the expiration of the term for which the predecessor was appointed shall be appointed only for the remainder of that term.

(B) Term limitation

No person may serve as a member of the Board, or as chairperson of the Board, for more than 2 terms, whether or not such terms of service are consecutive.

(6) Removal from office

A member of the Board may be removed by the Commission from office, in accordance with section 7217(d)(3) of this title, for good cause shown before the expiration of the term of that member.

(f) Powers of the Board

In addition to any authority granted to the Board otherwise in this Act, the Board shall have the power, subject to section 7217 of this title—

(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, with the

approval of the Commission, in any Federal, State, or other court;

(2) to conduct its operations and maintain offices, and to exercise all other rights and powers authorized by this Act, in any State, without regard to any qualification, licensing, or other provision of law in effect in such State (or a political subdivision thereof);

(3) to lease, purchase, accept gifts or donations of or otherwise acquire, improve, use, sell, exchange, or convey, all of or an interest in any property, wherever situated;

(4) to appoint such employees, accountants, attorneys, and other agents as may be necessary or appropriate, and to determine their qualifications, define their duties, and fix their salaries or other compensation (at a level that is comparable to private sector self-regulatory, accounting, technical, supervisory, or other staff or management positions);

(5) to allocate, assess, and collect accounting support fees established pursuant to section 7219 of this title, for the Board, and other fees and charges imposed under this subchapter; and

(6) to enter into contracts, execute instruments, incur liabilities, and do any and all other acts and things necessary, appropriate, or incidental to the conduct of its operations and the exercise of its obligations, rights, and powers imposed or granted by this subchapter.

(g) Rules of the Board

The rules of the Board shall, subject to the approval of the Commission—

(1) provide for the operation and administration of the Board, the exercise of its authority, and the performance of its responsibilities under this Act;

(2) permit, as the Board determines necessary or appropriate, delegation by the Board of any of its functions to an individual member or employee of the Board, or to a division of the Board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any matter, except that—

(A) the Board shall retain a discretionary right to review any action pursuant to any such delegated function, upon its own motion;

(B) a person shall be entitled to a review by the Board with respect to any matter so delegated, and the decision of the Board upon such review shall be deemed to be the action of the Board for all purposes (including appeal or review thereof); and

(C) if the right to exercise a review described in subparagraph (A) is declined, or if no such review is sought within the time stated in the rules of the Board, then the action taken by the holder of such delegation shall for all purposes, including appeal or review thereof, be deemed to be the action of the Board;

(3) establish ethics rules and standards of conduct for Board members and staff, including a bar on practice before the Board (and the Commission, with respect to Board-related matters) of 1 year for former members of the Board, and appropriate periods (not to exceed 1 year) for former staff of the Board; and

(4) provide as otherwise required by this Act.

(h) Annual report to the Commission

The Board shall submit an annual report (including its audited financial statements) to the Commission, and the Commission shall transmit a copy of that report to the Committee on Banking, Housing, and Urban Affairs

of the Senate, and the Committee on Financial Services of the House of Representatives, not later than 30 days after the date of receipt of that report by the Commission.

§ 7212. Registration with the Board

(a) Mandatory registration

Beginning 180 days after the date of the determination of the Commission under section 7211(d) of this title, it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer.

(b) Applications for registration

(1) Form of application

A public accounting firm shall use such form as the Board may prescribe, by rule, to apply for registration under this section.

(2) Contents of applications

Each public accounting firm shall submit, as part of its application for registration, in such detail as the Board shall specify—

(A) the names of all issuers for which the firm prepared or issued audit reports during the immediately preceding calendar year, and for which the firm expects to prepare or issue audit reports during the current calendar year;

(B) the annual fees received by the firm from each such issuer for audit services, other accounting services, and non-audit services, respectively;

(C) such other current financial information for the most recently completed fiscal year of the firm as the Board may reasonably request;

(D) a statement of the quality control policies of the firm for its accounting and auditing practices;

(E) a list of all accountants associated with the firm who participate in or contribute to the preparation of audit reports, stating the license or certification number of each such person, as well as the State license numbers of the firm itself;

(F) information relating to criminal, civil, or administrative actions or disciplinary proceedings pending against the firm or any associated person of the firm in connection with any audit report;

(G) copies of any periodic or annual disclosure filed by an issuer with the Commission during the immediately preceding calendar year which discloses accounting disagreements between such issuer and the firm in connection with an audit report furnished or prepared by the firm for such issuer; and

(H) such other information as the rules of the Board or the Commission shall specify as necessary or appropriate in the public interest or for the protection of investors.

(3) Consents

Each application for registration under this subsection shall include—

(A) a consent executed by the public accounting firm to cooperation in and compliance with any request for testimony or the production of documents made by the Board in the furtherance of its authority and responsibilities under this subchapter (and an agreement to secure and enforce similar consents from each of the associated persons of the public accounting firm as a condition of their continued employment by or other association with such firm); and

(B) a statement that such firm understands and agrees that cooperation and compliance, as described in the consent required by subparagraph (A), and the securing and enforcement of such consents from its associated persons, in accordance with the rules of the Board, shall be a condition to the continuing effectiveness of the registration of the firm with the Board.

(c) Action on applications

(1) Timing

The Board shall approve a completed application for registration not later than 45 days after the date of receipt of the application, in accordance with the rules of the Board, unless the Board, prior to such date, issues a written notice of disapproval to, or requests more information from, the prospective registrant.

(2) Treatment

A written notice of disapproval of a completed application under paragraph (1) for registration shall be treated as a disciplinary sanction for purposes of sections 7215(d) and 7217(c) of this title.

(d) Periodic reports

Each registered public accounting firm shall submit an annual report to the Board, and may be required to report more frequently, as necessary to update the information contained in its application for registration under this section, and to provide to the Board such additional information as the Board or the Commission may specify, in accordance with subsection (b)(2) of this section.

(e) Public availability

Registration applications and annual reports required by this subsection, or such portions of such applications or reports as may be designated under rules of the

Board, shall be made available for public inspection, subject to rules of the Board or the Commission, and to applicable laws relating to the confidentiality of proprietary, personal, or other information contained in such applications or reports, provided that, in all events, the Board shall protect from public disclosure information reasonably identified by the subject accounting firm as proprietary information.

(f) Registration and annual fees

The Board shall assess and collect a registration fee and an annual fee from each registered public accounting firm, in amounts that are sufficient to recover the costs of processing and reviewing applications and annual reports.

§ 7213. Auditing, quality control, and independence standards and rules

(a) Auditing, quality control, and ethics standards

(1) In general

The Board shall, by rule, establish, including, to the extent it determines appropriate, through adoption of standards proposed by 1 or more professional groups of accountants designated pursuant to paragraph (3)(A) or advisory groups convened pursuant to paragraph (4), and amend or otherwise modify or alter, such auditing and related attestation standards, such quality control standards, and such ethics standards to be used by registered public accounting firms in the preparation and issuance of audit reports, as required by this Act or the rules of the Commission, or as may be necessary or appropriate in the public interest or for the protection of investors.

(2) Rule requirements

In carrying out paragraph (1), the Board—

(A) shall include in the auditing standards that it adopts, requirements that each registered public accounting firm shall—

(i) prepare, and maintain for a period of not less than 7 years, audit work papers, and other information related to any audit report, in sufficient detail to support the conclusions reached in such report;

(ii) provide a concurring or second partner review and approval of such audit report (and other related information), and concurring approval in its issuance, by a qualified person (as prescribed by the Board) associated with the public accounting firm, other than the person in charge of the audit, or by an independent reviewer (as prescribed by the Board); and

(iii) describe in each audit report the scope of the auditor's testing of the internal control structure and procedures of the issuer, required by section 7262(b) of this title, and present (in such report or in a separate report)—

(I) the findings of the auditor from such testing;

(II) an evaluation of whether such internal control structure and procedures—

(aa) include maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer;

(bb) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accor-

dance with authorizations of management and directors of the issuer; and

(III) a description, at a minimum, of material weaknesses in such internal controls, and of any material noncompliance found on the basis of such testing.

(B) shall include, in the quality control standards that it adopts with respect to the issuance of audit reports, requirements for every registered public accounting firm relating to—

(i) monitoring of professional ethics and independence from issuers on behalf of which the firm issues audit reports;

(ii) consultation within such firm on accounting and auditing questions;

(iii) supervision of audit work;

(iv) hiring, professional development, and advancement of personnel;

(v) the acceptance and continuation of engagements;

(vi) internal inspection; and

(vii) such other requirements as the Board may prescribe, subject to subsection (a)(1) of this section.

(3) Authority to adopt other standards

(A) In general

In carrying out this subsection, the Board—

(i) may adopt as its rules, subject to the terms of section 7217 of this title, any portion of any statement of auditing standards or other professional standards that the Board determines satisfy the requirements of paragraph (1), and that were proposed by 1 or more professional

groups of accountants that shall be designated or recognized by the Board, by rule, for such purpose, pursuant to this paragraph or 1 or more advisory groups convened pursuant to paragraph (4); and

(ii) notwithstanding clause (i), shall retain full authority to modify, supplement, revise, or subsequently amend, modify, or repeal, in whole or in part, any portion of any statement described in clause (i).

(B) Initial and transitional standards

The Board shall adopt standards described in subparagraph (A)(i) as initial or transitional standards, to the extent the Board determines necessary, prior to a determination of the Commission under section 7211(d) of this title, and such standards shall be separately approved by the Commission at the time of that determination, without regard to the procedures required by section 7217 of this title that otherwise would apply to the approval of rules of the Board.

(4) Advisory groups

The Board shall convene, or authorize its staff to convene, such expert advisory groups as may be appropriate, which may include practicing accountants and other experts, as well as representatives of other interested groups, subject to such rules as the Board may prescribe to prevent conflicts of interest, to make recommendations concerning the content (including proposed drafts) of auditing, quality control, ethics, independence, or other standards required to be established under this section.

(b) Independence standards and rules

The Board shall establish such rules as may be necessary or appropriate in the public interest or for the protection of investors, to implement, or as authorized under, title II of this Act.

(c) Cooperation with designated professional groups of accountants and advisory groups

(1) In general

The Board shall cooperate on an ongoing basis with professional groups of accountants designated under subsection (a)(3)(A) of this section and advisory groups convened under subsection (a)(4) of this section in the examination of the need for changes in any standards subject to its authority under subsection (a) of this section, recommend issues for inclusion on the agendas of such designated professional groups of accountants or advisory groups, and take such other steps as it deems appropriate to increase the effectiveness of the standard setting process.

(2) Board responses

The Board shall respond in a timely fashion to requests from designated professional groups of accountants and advisory groups referred to in paragraph (1) for any changes in standards over which the Board has authority.

(d) Evaluation of standard setting process

The Board shall include in the annual report required by section 7211(h) of this title the results of its standard setting responsibilities during the period to which the report relates, including a discussion of the work of the Board with any designated professional groups of accountants and advisory groups described in paragraphs (3)(A) and (4) of subsection (a) of this section, and its pending issues agenda for future standard setting projects.

§ 7214. Inspections of registered public accounting firms

(a) In general

The Board shall conduct a continuing program of inspections to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with this Act, the rules of the Board, the rules of the Commission, or professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers.

(b) Inspection frequency

(1) In general

Subject to paragraph (2), inspections required by this section shall be conducted—

(A) annually with respect to each registered public accounting firm that regularly provides audit reports for more than 100 issuers; and

(B) not less frequently than once every 3 years with respect to each registered public accounting firm that regularly provides audit reports for 100 or fewer issuers.

(2) Adjustments to schedules

The Board may, by rule, adjust the inspection schedules set under paragraph (1) if the Board finds that different inspection schedules are consistent with the purposes of this Act, the public interest, and the protection of investors. The Board may conduct special inspections at the request of the Commission or upon its own motion.

(c) Procedures

The Board shall, in each inspection under this section, and in accordance with its rules for such inspections—

(1) identify any act or practice or omission to act by the registered public accounting firm, or by any associ-

ated person thereof, revealed by such inspection that may be in violation of this Act, the rules of the Board, the rules of the Commission, the firm's own quality control policies, or professional standards;

(2) report any such act, practice, or omission, if appropriate, to the Commission and each appropriate State regulatory authority; and

(3) begin a formal investigation or take disciplinary action, if appropriate, with respect to any such violation, in accordance with this Act and the rules of the Board.

(d) Conduct of inspections

In conducting an inspection of a registered public accounting firm under this section, the Board shall—

(1) inspect and review selected audit and review engagements of the firm (which may include audit engagements that are the subject of ongoing litigation or other controversy between the firm and 1 or more third parties), performed at various offices and by various associated persons of the firm, as selected by the Board;

(2) evaluate the sufficiency of the quality control system of the firm, and the manner of the documentation and communication of that system by the firm; and

(3) perform such other testing of the audit, supervisory, and quality control procedures of the firm as are necessary or appropriate in light of the purpose of the inspection and the responsibilities of the Board.

(e) Record retention

The rules of the Board may require the retention by registered public accounting firms for inspection purposes of records whose retention is not otherwise required by section 7213 of this title or the rules issued thereunder.

(f) Procedures for review

The rules of the Board shall provide a procedure for the review of and response to a draft inspection report by the registered public accounting firm under inspection. The Board shall take such action with respect to such response as it considers appropriate (including revising the draft report or continuing or supplementing its inspection activities before issuing a final report), but the text of any such response, appropriately redacted to protect information reasonably identified by the accounting firm as confidential, shall be attached to and made part of the inspection report.

(g) Report

A written report of the findings of the Board for each inspection under this section, subject to subsection (h) of this section, shall be—

(1) transmitted, in appropriate detail, to the Commission and each appropriate State regulatory authority, accompanied by any letter or comments by the Board or the inspector, and any letter of response from the registered public accounting firm; and

(2) made available in appropriate detail to the public (subject to section 7215(b)(5)(A) of this title, and to the protection of such confidential and proprietary information as the Board may determine to be appropriate, or as may be required by law), except that no portions of the inspection report that deal with criticisms of or potential defects in the quality control systems of the firm under inspection shall be made public if those criticisms or defects are addressed by the firm, to the satisfaction of the Board, not later than 12 months after the date of the inspection report.

(h) Interim Commission review

(1) Reviewable matters

A registered public accounting firm may seek review by the Commission, pursuant to such rules as the Commission shall promulgate, if the firm—

(A) has provided the Board with a response, pursuant to rules issued by the Board under subsection (f) of this section, to the substance of particular items in a draft inspection report, and disagrees with the assessments contained in any final report prepared by the Board following such response; or

(B) disagrees with the determination of the Board that criticisms or defects identified in an inspection report have not been addressed to the satisfaction of the Board within 12 months of the date of the inspection report, for purposes of subsection (g)(2) of this section.

(2) Treatment of review

Any decision of the Commission with respect to a review under paragraph (1) shall not be reviewable under section 78y of this title, or deemed to be "final agency action" for purposes of section 704 of Title 5.

(3) Timing

Review under paragraph (1) may be sought during the 30-day period following the date of the event giving rise to the review under subparagraph (A) or (B) of paragraph (1).

§ 7215. Investigations and disciplinary proceedings

(a) In general

The Board shall establish, by rule, subject to the requirements of this section, fair procedures for the investigation and disciplining of registered public accounting firms and associated persons of such firms.

(b) Investigations

(1) Authority

In accordance with the rules of the Board, the Board may conduct an investigation of any act or practice, or omission to act, by a registered public accounting firm, any associated person of such firm, or both, that may violate any provision of this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under this Act, or professional standards, regardless of how the act, practice, or omission is brought to the attention of the Board.

(2) Testimony and document production

In addition to such other actions as the Board determines to be necessary or appropriate, the rules of the Board may—

(A) require the testimony of the firm or of any person associated with a registered public accounting firm, with respect to any matter that the Board considers relevant or material to an investigation;

(B) require the production of audit work papers and any other document or information in the possession of a registered public accounting firm or any associated person thereof, wherever domiciled, that the Board considers relevant or material to the investigation, and may inspect the books and records of such firm or associated person to verify the accuracy of any documents or information supplied;

(C) request the testimony of, and production of any document in the possession of, any other person, including any client of a registered public accounting firm that the Board considers relevant or material to an investiga-

tion under this section, with appropriate notice, subject to the needs of the investigation, as permitted under the rules of the Board; and

(D) provide for procedures to seek issuance by the Commission, in a manner established by the Commission, of a subpoena to require the testimony of, and production of any document in the possession of, any person, including any client of a registered public accounting firm, that the Board considers relevant or material to an investigation under this section.

(3) Noncooperation with investigations

(A) In general

If a registered public accounting firm or any associated person thereof refuses to testify, produce documents, or otherwise cooperate with the Board in connection with an investigation under this section, the Board may—

(i) suspend or bar such person from being associated with a registered public accounting firm, or require the registered public accounting firm to end such association;

(ii) suspend or revoke the registration of the public accounting firm; and

(iii) invoke such other lesser sanctions as the Board considers appropriate, and as specified by rule of the Board.

(B) Procedure

Any action taken by the Board under this paragraph shall be subject to the terms of section 7217(c) of this title.

(4) Coordination and referral of investigations

(A) Coordination

The Board shall notify the Commission of any pending Board investigation involving a potential violation of the securities laws, and thereafter coordinate its work with the work of the Commission's Division of Enforcement, as necessary to protect an ongoing Commission investigation.

(B) Referral

The Board may refer an investigation under this section—

(i) to the Commission;

(ii) to any other Federal functional regulator (as defined in section 6809 of this title), in the case of an investigation that concerns an audit report for an institution that is subject to the jurisdiction of such regulator; and

(iii) at the direction of the Commission, to—

(I) the Attorney General of the United States;

(II) the attorney general of 1 or more States; and

(III) the appropriate State regulatory authority.

(5) Use of documents

(A) Confidentiality

Except as provided in subparagraph (B), all documents and information prepared or received by or specifically for the Board, and deliberations of the Board and its employees and agents, in connection with an inspection under section 7214 of this title or with an investigation under this section, shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process) in any proceeding in any Federal or State court or administrative agency, and shall be exempt from disclosure, in the hands of

an agency or establishment of the Federal Government, under the Freedom of Information Act (5 U.S.C. 552a), or otherwise, unless and until presented in connection with a public proceeding or released in accordance with subsection (c) of this section.

(B) Availability to Government agencies

Without the loss of its status as confidential and privileged in the hands of the Board, all information referred to in subparagraph (A) may—

(i) be made available to the Commission; and

(ii) in the discretion of the Board, when determined by the Board to be necessary to accomplish the purposes of this Act or to protect investors, be made available to—

(I) the Attorney General of the United States;

(II) the appropriate Federal functional regulator (as defined in section 6809 of this title), other than the Commission, and the Director of the Federal Housing Finance Agency, with respect to an audit report for an institution subject to the jurisdiction of such regulator;

(III) State attorneys general in connection with any criminal investigation; and

(IV) any appropriate State regulatory authority,

each of which shall maintain such information as confidential and privileged.

(6) Immunity

Any employee of the Board engaged in carrying out an investigation under this Act shall be immune from any civil liability arising out of such investigation in the same manner and to the same extent as an employee of the Federal Government in similar circumstances.

(c) Disciplinary procedures

(1) Notification; recordkeeping

The rules of the Board shall provide that in any proceeding by the Board to determine whether a registered public accounting firm, or an associated person thereof, should be disciplined, the Board shall—

(A) bring specific charges with respect to the firm or associated person;

(B) notify such firm or associated person of, and provide to the firm or associated person an opportunity to defend against, such charges; and

(C) keep a record of the proceedings.

(2) Public hearings

Hearings under this section shall not be public, unless otherwise ordered by the Board for good cause shown, with the consent of the parties to such hearing.

(3) Supporting statement

A determination by the Board to impose a sanction under this subsection shall be supported by a statement setting forth—

(A) each act or practice in which the registered public accounting firm, or associated person, has engaged (or omitted to engage), or that forms a basis for all or a part of such sanction;

(B) the specific provision of this Act, the securities laws, the rules of the Board, or professional standards which the Board determines has been violated; and

(C) the sanction imposed, including a justification for that sanction.

(4) Sanctions

If the Board finds, based on all of the facts and circumstances, that a registered public accounting firm or

associated person thereof has engaged in any act or practice, or omitted to act, in violation of this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under this Act, or professional standards, the Board may impose such disciplinary or remedial sanctions as it determines appropriate, subject to applicable limitations under paragraph (5), including—

(A) temporary suspension or permanent revocation of registration under this subchapter;

(B) temporary or permanent suspension or bar of a person from further association with any registered public accounting firm;

(C) temporary or permanent limitation on the activities, functions, or operations of such firm or person (other than in connection with required additional professional education or training);

(D) a civil money penalty for each such violation, in an amount equal to—

(i) not more than $100,000 for a natural person or $2,000,000 for any other person; and

(ii) in any case to which paragraph (5) applies, not more than $750,000 for a natural person or $15,000,000 for any other person;

(E) censure;

(F) required additional professional education or training; or

(G) any other appropriate sanction provided for in the rules of the Board.

(5) Intentional or other knowing conduct

The sanctions and penalties described in subparagraphs (A) through (C) and (D)(ii) of paragraph (4) shall only apply to—

(A) intentional or knowing conduct, including reckless conduct, that results in violation of the applicable statutory, regulatory, or professional standard; or

(B) repeated instances of negligent conduct, each resulting in a violation of the applicable statutory, regulatory, or professional standard.

(6) Failure to supervise

(A) In general

The Board may impose sanctions under this section on a registered accounting firm or upon the supervisory personnel of such firm, if the Board finds that—

(i) the firm has failed reasonably to supervise an associated person, either as required by the rules of the Board relating to auditing or quality control standards, or otherwise, with a view to preventing violations of this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission under this Act, or professional standards; and

(ii) such associated person commits a violation of this Act, or any of such rules, laws, or standards.

(B) Rule of construction

No associated person of a registered public accounting firm shall be deemed to have failed reasonably to supervise any other person for purposes of subparagraph (A), if—

(i) there have been established in and for that firm procedures, and a system for applying such procedures, that comply with applicable rules of the Board and that would reasonably be expected to prevent and detect any such violation by such associated person; and

(ii) such person has reasonably discharged the duties and obligations incumbent upon that person by reason of such procedures and system, and had no reasonable cause to believe that such procedures and system were not being complied with.

(7) Effect of suspension

(A) Association with a public accounting firm

It shall be unlawful for any person that is suspended or barred from being associated with a registered public accounting firm under this subsection willfully to become or remain associated with any registered public accounting firm, or for any registered public accounting firm that knew, or, in the exercise of reasonable care should have known, of the suspension or bar, to permit such an association, without the consent of the Board or the Commission.

(B) Association with an issuer

It shall be unlawful for any person that is suspended or barred from being associated with an issuer under this subsection willfully to become or remain associated with any issuer in an accountancy or a financial management capacity, and for any issuer that knew, or in the exercise of reasonable care should have known, of such suspension or bar, to permit such an association, without the consent of the Board or the Commission.

(d) Reporting of sanctions

(1) Recipients

If the Board imposes a disciplinary sanction, in accordance with this section, the Board shall report the sanction to—

(A) the Commission;

(B) any appropriate State regulatory authority or any foreign accountancy licensing board with which such firm or person is licensed or certified; and

(C) the public (once any stay on the imposition of such sanction has been lifted).

(2) Contents

The information reported under paragraph (1) shall include—

(A) the name of the sanctioned person;

(B) a description of the sanction and the basis for its imposition; and

(C) such other information as the Board deems appropriate.

(e) Stay of sanctions

(1) In general

Application to the Commission for review, or the institution by the Commission of review, of any disciplinary action of the Board shall operate as a stay of any such disciplinary action, unless and until the Commission orders (summarily or after notice and opportunity for hearing on the question of a stay, which hearing may consist solely of the submission of affidavits or presentation of oral arguments) that no such stay shall continue to operate.

(2) Expedited procedures

The Commission shall establish for appropriate cases an expedited procedure for consideration and determination of the question of the duration of a stay pending review of any disciplinary action of the Board under this subsection.

§ 7216. Foreign public accounting firms

(a) Applicability to certain foreign firms

(1) In general

Any foreign public accounting firm that prepares or furnishes an audit report with respect to any issuer, shall be subject to this Act and the rules of the Board and the Commission issued under this Act, in the same manner and to the same extent as a public accounting firm that is organized and operates under the laws of the United States or any State, except that registration pursuant to section 7212 of this title shall not by itself provide a basis for subjecting such a foreign public accounting firm to the jurisdiction of the Federal or State courts, other than with respect to controversies between such firms and the Board.

(2) Board authority

The Board may, by rule, determine that a foreign public accounting firm (or a class of such firms) that does not issue audit reports nonetheless plays such a substantial role in the preparation and furnishing of such reports for particular issuers, that it is necessary or appropriate, in light of the purposes of this Act and in the public interest or for the protection of investors, that such firm (or class of firms) should be treated as a public accounting firm (or firms) for purposes of registration under, and oversight by the Board in accordance with, this subchapter.

(b) Production of audit workpapers

(1) Consent by foreign firms

If a foreign public accounting firm issues an opinion or otherwise performs material services upon which a registered public accounting firm relies in issuing all or part of any audit report or any opinion contained in an audit report, that foreign public accounting firm shall be deemed to have consented—

(A) to produce its audit workpapers for the Board or the Commission in connection with any investigation by either body with respect to that audit report; and

(B) to be subject to the jurisdiction of the courts of the United States for purposes of enforcement of any request for production of such workpapers.

(2) Consent by domestic firms

A registered public accounting firm that relies upon the opinion of a foreign public accounting firm, as described in paragraph (1), shall be deemed—

(A) to have consented to supplying the audit workpapers of that foreign public accounting firm in response to a request for production by the Board or the Commission; and

(B) to have secured the agreement of that foreign public accounting firm to such production, as a condition of its reliance on the opinion of that foreign public accounting firm.

(c) Exemption authority

The Commission, and the Board, subject to the approval of the Commission, may, by rule, regulation, or order, and as the Commission (or Board) determines necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions exempt any foreign public

accounting firm, or any class of such firms, from any provision of this Act or the rules of the Board or the Commission issued under this Act.

(d) Definition

In this section, the term "foreign public accounting firm" means a public accounting firm that is organized and operates under the laws of a foreign government or political subdivision thereof.

§ 7217. Commission oversight of the Board

(a) General oversight responsibility

The Commission shall have oversight and enforcement authority over the Board, as provided in this Act. The provisions of section 78q(a)(1) of this title, and of section 78q(b)(1) of this title shall apply to the Board as fully as if the Board were a "registered securities association" for purposes of those sections 78q(a)(1) and 78(b)(1) of this title.

(b) Rules of the Board

(1) Definition

In this section, the term "proposed rule" means any proposed rule of the Board, and any modification of any such rule.

(2) Prior approval required

No rule of the Board shall become effective without prior approval of the Commission in accordance with this section, other than as provided in section 7213(a)(3)(B) of this title with respect to initial or transitional standards.

(3) Approval criteria

The Commission shall approve a proposed rule, if it finds that the rule is consistent with the requirements of this Act and the securities laws, or is necessary or appro-

priate in the public interest or for the protection of investors.

(4) Proposed rule procedures

The provisions of paragraphs (1) through (3) of section 78s(b) of this title shall govern the proposed rules of the Board, as fully as if the Board were a "registered securities association" for purposes of that section 78s(b) of this title, except that, for purposes of this paragraph—

(A) the phrase "consistent with the requirements of this chapter and the rules and regulations thereunder applicable to such organization" in section 78s(b)(2) of this title shall be deemed to read "consistent with the requirements of title I of the Sarbanes-Oxley Act of 2002, and the rules and regulations issued thereunder applicable to such organization, or as necessary or appropriate in the public interest or for the protection of investors"; and

(B) the phrase "otherwise in furtherance of the purposes of this chapter" in section 78s(b)(3)(C) of this title shall be deemed to read "otherwise in furtherance of the purposes of title I of the Sarbanes-Oxley Act of 2002".

(5) Commission authority to amend rules of the Board

The provisions of section 78s(c) of this title shall govern the abrogation, deletion, or addition to portions of the rules of the Board by the Commission as fully as if the Board were a "registered securities association" for purposes of that section 78s(c) of this title, except that the phrase "to conform its rules to the requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter" in section 78s(c) of this title shall, for purposes of this paragraph, be deemed to read

"to assure the fair administration of the Public Company Accounting Oversight Board, conform the rules promulgated by that Board to the requirements of title I of the Sarbanes-Oxley Act of 2002, or otherwise further the purposes of that Act, the securities laws, and the rules and regulations thereunder applicable to that Board".

(c) Commission review of disciplinary action taken by the Board

(1) Notice of sanction

The Board shall promptly file notice with the Commission of any final sanction on any registered public accounting firm or on any associated person thereof, in such form and containing such information as the Commission, by rule, may prescribe.

(2) Review of sanctions

The provisions of sections 78s(d)(2) and 78s(e)(1) of this title shall govern the review by the Commission of final disciplinary sanctions imposed by the Board (including sanctions imposed under section 7215(b)(3) of this title for noncooperation in an investigation of the Board), as fully as if the Board were a self-regulatory organization and the Commission were the appropriate regulatory agency for such organization for purposes of those sections 78s(d)(2) and 78s(e)(1) of this title, except that, for purposes of this paragraph—

(A) section 7215(e) of this title (rather than that section 78s(d)(2) of this title) shall govern the extent to which application for, or institution by the Commission on its own motion of, review of any disciplinary action of the Board operates as a stay of such action;

(B) references in that section 78s(e)(1) of this title to "members" of such an organization shall be deemed to be references to registered public accounting firms;

(C) the phrase "consistent with the purposes of this chapter" in that section 78s(e)(1) of this title shall be deemed to read "consistent with the purposes of this chapter and title I of the Sarbanes-Oxley Act of 2002";

(D) references to rules of the Municipal Securities Rulemaking Board in that section 78s(e)(1) of this title shall not apply; and

(E) the reference to section 78s(e)(2) of this title shall refer instead to section 7217(c)(3) of this title.

(3) Commission modification authority

The Commission may enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board upon a registered public accounting firm or associated person thereof, if the Commission, having due regard for the public interest and the protection of investors, finds, after a proceeding in accordance with this subsection, that the sanction—

(A) is not necessary or appropriate in furtherance of this Act or the securities laws; or

(B) is excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed.

(d) Censure of the Board; other sanctions

(1) Rescission of Board authority

The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this Act and the securities laws, may relieve the Board of any responsibility to enforce compliance with any provision of this Act, the securities laws, the rules of the Board, or professional standards.

(2) Censure of the Board; limitations

The Commission may, by order, as it determines necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act or the securities laws, censure or impose limitations upon the activities, functions, and operations of the Board, if the Commission finds, on the record, after notice and opportunity for a hearing, that the Board—

(A) has violated or is unable to comply with any provision of this Act, the rules of the Board, or the securities laws; or

(B) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by a registered public accounting firm or an associated person thereof.

(3) Censure of Board members; removal from office

The Commission may, as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act or the securities laws, remove from office or censure any member of the Board, if the Commission finds, on the record, after notice and opportunity for a hearing, that such member—

(A) has willfully violated any provision of this Act, the rules of the Board, or the securities laws;

(B) has willfully abused the authority of that member; or

(C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.

§ 7218. Accounting standards

(a) Omitted

(b) Commission authority

The Commission shall promulgate such rules and regulations to carry out section 77s(b) of this title as it deems necessary or appropriate in the public interest or for the protection of investors.

(c) No effect on Commission powers

Nothing in this Act, including this section and the amendment made by this section, shall be construed to impair or limit the authority of the Commission to establish accounting principles or standards for purposes of enforcement of the securities laws.

(d) Study and report on adopting principles-based accounting

(1) Study

(A) In general

The Commission shall conduct a study on the adoption by the United States financial reporting system of a principles-based accounting system.

(B) Study topics

The study required by subparagraph (A) shall include an examination of—

(i) the extent to which principles-based accounting and financial reporting exists in the United States;

(ii) the length of time required for change from a rules-based to a principles-based financial reporting system;

(iii) the feasibility of and proposed methods by which a principles-based system may be implemented; and

(iv) a thorough economic analysis of the implementation of a principles-based system.

(2) Report

Not later than 1 year after July 30, 2002, the Commission shall submit a report on the results of the study required by paragraph (1) to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.

§ 7219. Funding

(a) In general

The Board, and the standard setting body designated pursuant to section 77s(b) of this title, as amended by section 7218 of this title, shall be funded as provided in this section.

(b) Annual budgets

The Board and the standard setting body referred to in subsection (a) of this section shall each establish a budget for each fiscal year, which shall be reviewed and approved according to their respective internal procedures not less than 1 month prior to the commencement of the fiscal year to which the budget pertains (or at the beginning of the Board's first fiscal year, which may be a short fiscal year). The budget of the Board shall be subject to approval by the Commission. The budget for the first fiscal year of the Board shall be prepared and approved promptly following the appointment of the initial five Board members, to permit action by the Board of the organizational tasks contemplated by section 7211(d) of this title.

(c) Sources and uses of funds

(1) Recoverable budget expenses

The budget of the Board (reduced by any registration or annual fees received under section 7212(e) of this title for the year preceding the year for which the budget is being computed), and all of the budget of the standard setting body referred to in subsection (a) of this section, for each fiscal year of each of those 2 entities, shall be payable from annual accounting support fees, in accordance with subsections (d) and (e) of this section. Accounting support fees and other receipts of the Board and of such standard-setting body shall not be considered public monies of the United States.

(2) Funds generated from the collection of monetary penalties

Subject to the availability in advance in an appropriations Act, and notwithstanding subsection (i) of this section, all funds collected by the Board as a result of the assessment of monetary penalties shall be used to fund a merit scholarship program for undergraduate and graduate students enrolled in accredited accounting degree programs, which program is to be administered by the Board or by an entity or agent identified by the Board.

(d) Annual accounting support fee for the Board

(1) Establishment of fee

The Board shall establish, with the approval of the Commission, a reasonable annual accounting support fee (or a formula for the computation thereof), as may be necessary or appropriate to establish and maintain the Board. Such fee may also cover costs incurred in the Board's first fiscal year (which may be a short fiscal year), or may be levied separately with respect to such short fiscal year.

(2) Assessments

The rules of the Board under paragraph (1) shall provide for the equitable allocation, assessment, and collection by the Board (or an agent appointed by the Board) of the fee established under paragraph (1), among issuers, in accordance with subsection (g) of this section, allowing for differentiation among classes of issuers, as appropriate.

(e) Annual accounting support fee for standard setting body

The annual accounting support fee for the standard setting body referred to in subsection (a) of this section—

(1) shall be allocated in accordance with subsection (g) of this section, and assessed and collected against each issuer, on behalf of the standard setting body, by 1 or more appropriate designated collection agents, as may be necessary or appropriate to pay for the budget and provide for the expenses of that standard setting body, and to provide for an independent, stable source of funding for such body, subject to review by the Commission; and

(2) may differentiate among different classes of issuers.

(f) Limitation on fee

The amount of fees collected under this section for a fiscal year on behalf of the Board or the standards setting body, as the case may be, shall not exceed the recoverable budget expenses of the Board or body, respectively (which may include operating, capital, and accrued items), referred to in subsection (c)(1) of this section.

(g) Allocation of accounting support fees among issuers

Any amount due from issuers (or a particular class of issuers) under this section to fund the budget of the

Board or the standard setting body referred to in subsection (a) of this section shall be allocated among and payable by each issuer (or each issuer in a particular class, as applicable) in an amount equal to the total of such amount, multiplied by a fraction—

(1) the numerator of which is the average monthly equity market capitalization of the issuer for the 12-month period immediately preceding the beginning of the fiscal year to which such budget relates; and

(2) the denominator of which is the average monthly equity market capitalization of all such issuers for such 12-month period.

(h) Omitted

(i) Rule of construction

Nothing in this section shall be construed to render either the Board, the standard setting body referred to in subsection (a) of this section, or both, subject to procedures in Congress to authorize or appropriate public funds, or to prevent such organization from utilizing additional sources of revenue for its activities, such as earnings from publication sales, provided that each additional source of revenue shall not jeopardize, in the judgment of the Commission, the actual and perceived independence of such organization.

(j) Start-up expenses of the Board

From the unexpended balances of the appropriations to the Commission for fiscal year 2003, the Secretary of the Treasury is authorized to advance to the Board not to exceed the amount necessary to cover the expenses of the Board during its first fiscal year (which may be a short fiscal year).

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The Securities Exchange Act of 1934, as amended, 15 U.S.C. §§ 78a *et seq.*, provides in relevant part:

* * * * *

§ 78q. Records and reports

(a) Rules and regulations

(1) Every national securities exchange, member thereof, broker or dealer who transacts a business in securities through the medium of any such member, registered securities association, registered broker or dealer, registered municipal securities dealer, registered securities information processor, registered transfer agent, nationally recognized statistical rating organization, and registered clearing agency and the Municipal Securities Rulemaking Board shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter. Any report that a nationally recognized statistical rating organization is required by Commission rules under this paragraph to make and disseminate to the Commission shall be deemed furnished to the Commission.

* * * * *

(b) Records subject to examination

(1) Procedures for cooperation with other agencies

All records of persons described in subsection (a) of this section are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission and the appropriate regulatory agency for such persons as the

Commission or the appropriate regulatory agency for such persons deems necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter * * * .

* * * * *

§ 78s. Registration, responsibilities, and oversight of self-regulatory organizations

* * * * *

(b) Proposed rule changes; notice; proceedings

(1) Each self-regulatory organization shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization (hereinafter in this subsection collectively referred to as a "proposed rule change") accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, upon the filing of any proposed rule change, publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit written data, views, and arguments concerning such proposed rule change. No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection.

(2) Within thirty-five days of the date of publication of notice of the filing of a proposed rule change in accordance with paragraph (1) of this subsection, or within such longer period as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding

or as to which the self-regulatory organization consents, the Commission shall—

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved. Such proceedings shall include notice of the grounds for disapproval under consideration and opportunity for hearing and be concluded within one hundred eighty days of the date of publication of notice of the filing of the proposed rule change. At the conclusion of such proceedings the Commission, by order, shall approve or disapprove such proposed rule change. The Commission may extend the time for conclusion of such proceedings for up to sixty days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the self-regulatory organization consents.

The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this chapter and the rules and regulations thereunder applicable to such organization. The Commission shall disapprove a proposed rule change of a self-regulatory organization if it does not make such finding. The Commission shall not approve any proposed rule change prior to the thirtieth day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding.

(3)(A) Notwithstanding the provisions of paragraph (2) of this subsection, a proposed rule change may take effect upon filing with the Commission if designated by the self-regulatory organization as (i) consti-

tuting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization, (ii) establishing or changing a due, fee, or other charge imposed by the self-regulatory organization, or (iii) concerned solely with the administration of the self-regulatory organization or other matters which the Commission, by rule, consistent with the public interest and the purposes of this subsection, may specify as without the provisions of such paragraph (2).

(B) Notwithstanding any other provision of this subsection, a proposed rule change may be put into effect summarily if it appears to the Commission that such action is necessary for the protection of investors, the maintenance of fair and orderly markets, or the safeguarding of securities or funds. Any proposed rule change so put into effect shall be filed promptly thereafter in accordance with the provisions of paragraph (1) of this subsection.

(C) Any proposed rule change of a self-regulatory organization which has taken effect pursuant to subparagraph (A) or (B) of this paragraph may be enforced by such organization to the extent it is not inconsistent with the provisions of this chapter, the rules and regulations thereunder, and applicable Federal and State law. At any time within sixty days of the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) of this subsection, the Commission summarily may abrogate the change in the rules of the self-regulatory organization made thereby and require that the proposed rule change be refiled in accordance with the provisions of paragraph (1) of this subsection and re-

viewed in accordance with the provisions of paragraph (2) of this subsection, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter. Commission action pursuant to the preceding sentence shall not affect the validity or force of the rule change during the period it was in effect and shall not be reviewable under section 78y of this title nor deemed to be "final agency action" for purposes of section 704 of Title 5.

* * * * *

(c) Amendment by Commission of rules of self-regulatory organizations

The Commission, by rule, may abrogate, add to, and delete from (hereinafter in this subsection collectively referred to as "amend") the rules of a self-regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter, in the following manner:

(1) The Commission shall notify the self-regulatory organization and publish notice of the proposed rulemaking in the Federal Register. The notice shall include the text of the proposed amendment to the rules of the self-regulatory organization and a statement of the Commission's reasons, including any pertinent facts, for commencing such proposed rulemaking.

(2) The Commission shall give interested persons an opportunity for the oral presentation of data, views, and arguments, in addition to an opportunity to make written

submissions. A transcript shall be kept of any oral presentation.

(3) A rule adopted pursuant to this subsection shall incorporate the text of the amendment to the rules of the self-regulatory organization and a statement of the Commission's basis for and purpose in so amending such rules. This statement shall include an identification of any facts on which the Commission considers its determination so to amend the rules of the self-regulatory agency to be based, including the reasons for the Commission's conclusions as to any of such facts which were disputed in the rulemaking.

(4)(A) Except as provided in paragraphs (1) through (3) of this subsection, rulemaking under this subsection shall be in accordance with the procedures specified in section 553 of Title 5 for rulemaking not on the record.

(B) Nothing in this subsection shall be construed to impair or limit the Commission's power to make, or to modify or alter the procedures the Commission may follow in making, rules and regulations pursuant to any other authority under this chapter.

(C) Any amendment to the rules of a self-regulatory organization made by the Commission pursuant to this subsection shall be considered for all purposes of this chapter to be part of the rules of such self-regulatory organization and shall not be considered to be a rule of the Commission.

(5) With respect to rules described in subsection (b)(5) of this section, the Commission shall consult with and consider the views of the Secretary of the Treasury before abrogating, adding to, and deleting from such rules, except where the Commission determines that an

emergency exists requiring expeditious or summary action and publishes its reasons therefor.

(d) Notice of disciplinary action taken by self-regulatory organization against a member or participant; review of action by appropriate regulatory agency; procedure

* * * * *

(2) Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine. Application to such appropriate regulatory agency for review, or the institution of review by such appropriate regulatory agency on its own motion, shall not operate as a stay of such action unless such appropriate regulatory agency otherwise orders, summarily or after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments). Each appropriate regulatory agency shall establish for appropriate cases an expedited procedure for consideration and determination of the question of a stay.

* * * * *

(e) Disposition of review; cancellation, reduction, or remission of sanction

(1) In any proceeding to review a final disciplinary sanction imposed by a self-regulatory organization on a

member thereof or participant therein or a person associated with such a member, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction)—

(A) if the appropriate regulatory agency for such member, participant, or person associated with a member finds that such member, participant, or person associated with a member has engaged in such acts or practices, or has omitted such acts, as the self-regulatory organization has found him to have engaged in or omitted, that such acts or practices, or omissions to act, are in violation of such provisions of this chapter, the rules or regulations thereunder, the rules of the self-regulatory organization, or, in the case of a registered securities association, the rules of the Municipal Securities Rulemaking Board as have been specified in the determination of the self-regulatory organization, and that such provisions are, and were applied in a manner, consistent with the purposes of this chapter, such appropriate regulatory agency, by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization, modify the sanction in accordance with paragraph (2) of this subsection, or remand to the self-regulatory organization for further proceedings; or

(B) if such appropriate regulatory agency does not make any such finding it shall, by order, set aside the sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.

* * * * *

§ 78u. Investigations and actions

(a) Authority and discretion of Commission to investigate violations

(1) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

* * * * *

§ 78y. Court review of orders and rules

(a) Final Commission orders; persons aggrieved; petition; record; findings; affirmance, modification, enforcement, or setting aside of orders; remand to adduce additional evidence

(1) A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated by the Commission for that purpose. Thereupon the Commission shall file in the court the record on which the order complained of is entered, as provided in section 2112 of Title 28 and the Federal Rules of Appellate Procedure.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.

(4) The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

(5) If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers

appropriate. If the case is remanded to the Commission, it shall file in the court a supplemental record containing any new evidence, any further or modified findings, and any new order.

(b) Commission rules; persons adversely affected; petition; record; affirmance, enforcement, or setting aside of rules; findings; transfer of proceedings

(1) A person adversely affected by a rule of the Commission promulgated pursuant to section 78f, 78i(h)(2), 78k, 78k-1, 78o(c)(5) or (6), 78o-3, 78q, 78q-1, or 78s of this title may obtain review of this rule in the United States Court of Appeals for the circuit in which he resides or has his principal place of business or for the District of Columbia Circuit, by filing in such court, within sixty days after the promulgation of the rule, a written petition requesting that the rule be set aside.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated for that purpose. Thereupon, the Commission shall file in the court the rule under review and any documents referred to therein, the Commission's notice of proposed rulemaking and any documents referred to therein, all written submissions and the transcript of any oral presentations in the rulemaking, factual information not included in the foregoing that was considered by the Commission in the promulgation of the rule or proffered by the Commission as pertinent to the rule, the report of any advisory committee received or considered by the Commission in the rulemaking, and any other materials prescribed by the court.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the materi-

als set forth in paragraph (2) of this subsection, to affirm and enforce or to set aside the rule.

(4) The findings of the Commission as to the facts identified by the Commission as the basis, in whole or in part, of the rule, if supported by substantial evidence, are conclusive. The court shall affirm and enforce the rule unless the Commission's action in promulgating the rule is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law.

(5) If proceedings have been instituted under this subsection in two or more courts of appeals with respect to the same rule, the Commission shall file the materials set forth in paragraph (2) of this subsection in that court in which a proceeding was first instituted. The other courts shall thereupon transfer all such proceedings to the court in which the materials have been filed. For the convenience of the parties in the interest of justice that court may thereafter transfer all the proceedings to any other court of appeals.

(c) Objections not urged before Commission; stay of orders and rules; transfer of enforcement or review proceedings

(1) No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.

(2) The filing of a petition under this section does not operate as a stay of the Commission's order or rule. Un-

til the court's jurisdiction becomes exclusive, the Commission may stay its order or rule pending judicial review if it finds that justice so requires. After the filing of a petition under this section, the court, on whatever conditions may be required and to the extent necessary to prevent irreparable injury, may issue all necessary and appropriate process to stay the order or rule or to preserve status or rights pending its review; but (notwithstanding section 705 of Title 5) no such process may be issued by the court before the filing of the record or the materials set forth in subsection (b)(2) of this section unless: (A) the Commission has denied a stay or failed to grant requested relief, (B) a reasonable period has expired since the filing of an application for a stay without a decision by the Commission, or (C) there was reasonable ground for failure to apply to the Commission.

(3) When the same order or rule is the subject of one or more petitions for review filed under this section and an action for enforcement filed in a district court of the United States under section 78u(d) or (e) of this title, that court in which the petition or the action is first filed has jurisdiction with respect to the order or rule to the exclusion of any other court, and thereupon all such proceedings shall be transferred to that court; but, for the convenience of the parties in the interest of justice, that court may thereafter transfer all the proceedings to any other court of appeals or district court of the United States, whether or not a petition for review or an action for enforcement was originally filed in the transferee court. The scope of review by a district court under section 78u(d) or (e) of this title is in all cases the same as by a court of appeals under this section.

* * * * *

RESPONDENT'S BRIEF

143

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Supreme Court, U.S.
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In the Supreme Court of the United States

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP, PETITIONERS

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

In the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat, 745, Congress created the Public Company Accounting Oversight Board (Board) to standardize and regulate the auditing of public companies, subject to plenary oversight by the Securities and Exchange Commission (Commission). The issues presented are:

1. Whether the district court lacked jurisdiction because petitioners failed to exhaust the exclusive statutory review procedures for parties aggrieved by the Board's actions.

2. Whether Congress violated the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, by vesting the power to appoint members of the Board in the Commission.

3. Whether Congress violated the separation of powers by entrusting the regulation of public company auditors to the Board, subject to comprehensive oversight and control by the Commission.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-104a) is reported at 537 F.3d 667. The opinion of the district court (Pet. App. 106a-117a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2008. A petition for rehearing was denied on November 17, 2008 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on January 5, 2009, and was granted on May 18, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1). As explained at pp. 15-23, *infra*, however, the district court was barred from exercising jurisdiction in this case.

STATEMENT

1. In the wake of massive accounting failures that resulted in devastating harm to investors, Congress enacted the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley or Act), Pub. L. No. 107-204, 116 Stat. 745. The Act regulates the activities of accounting firms that audit public companies subject to the securities laws. 15 U.S.C. 7211(a), 7212(a). To ensure adequate oversight of those firms, Congress established the Public Company Accounting Oversight Board (PCAOB or Board) in Title I of the Act. §§ 101-109, 116 Stat. 750-771 (15 U.S.C. 7211-7219). The Board carries out its functions subject to comprehensive control by the Securities and Exchange Commission (SEC or Commission).

a. The Act charges the Board with "oversee[ing] the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports." 15 U.S.C. 7211(a). The Board's principal responsibilities are set out in 15 U.S.C. 7212-7215. Accounting firms that audit publicly traded companies must register with the Board, 15 U.S.C. 7212(a). They must also comply with auditing, quality-control, and ethics standards issued by the Board. 15 U.S.C. 7213(a)(1). To ensure compliance, the Act directs the Board to "conduct a continuing program of inspections" of registered accounting firms. 15 U.S.C. 7214(a).[1] Those inspections are conducted annually for firms that audit more than 100 issuers of securities, and at least once

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[1] As a condition of registration, a firm and its associated persons consent to cooperate with any request for testimony or documents by the Board in the furtherance of its responsibilities. 15 U.S.C. 7212(b)(3).

every three years for firms that audit fewer issuers, although the Board, by rule, may adjust those schedules. 15 U.S.C. 7214(b). The Board may also conduct special inspections at the request of the Commission or on its own motion. 15 U.S.C. 7214(b)(2).

The Act authorizes the Board to "conduct an investigation of any act or practice, or omission to act, by a registered public accounting firm, any associated person of such firm, or both, that may violate" the Act, the securities laws, the Board's rules, or the SEC's rules. 15 U.S.C. 7215(b)(1). The Board can also initiate disciplinary proceedings, which may result in sanctions up to and including suspension of the registration of a public accounting firm or associated person. 15 U.S.C. 7215(c).

b. In performing its functions, the Board is comprehensively subject to the "oversight and enforcement authority" of the SEC. 15 U.S.C. 7217(a); see 15 U.S.C. 7211(c) (in performing its duties under Sections 7212 to 7215, the Board is "subject to action by the Commission under [S]ection 7217 of this title").[2] In important respects, Congress patterned the Commission's relationship with the Board on its relationship with so-called self-regulatory organizations (SROs), like the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE), whose role in regulating

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[2] See also 15 U.S.C. 7211(c)(5) (Board shall "perform such other duties or functions as the Board (or the Commission, by rule or order) determines are necessary or appropriate"); 15 U.S.C. 7211(f) (certain additional powers are "subject to [S]ection 7217 of this title"). To assist in the exercise of the Commission's supervision over the Board, the Board must create, retain, and make available for examination by the Commission such records and reports as the Commission may determine to be necessary or appropriate. See 15 U.S.C. 7217(a) (incorporating 15 U.S.C. 78q(a)(1) and (b)(1)).

the securities markets the SEC had closely supervised and controlled for several decades.[3] S. Rep. No. 205, 107th Cong., 2d Sess. 12 (2002); see generally *Gordon* v. *NYSE*, 422 U.S. 659, 663-667 (1975). The authority exercised by SROs under the federal securities laws is "entirely derivative" and "ultimately belongs to the SEC," which has plenary authority to review and alter any regulatory or disciplinary decision the organizations may make. *NASD* v. *SEC*, 431 F.3d 803, 806 (D.C. Cir. 2005). Once the SEC has taken action in a regulatory or disciplinary matter initiated by an SRO, an aggrieved party may obtain judicial review by filing a petition in an appropriate court of appeals. 15 U.S.C. 78y(a).

The provisions of Sarbanes-Oxley providing for SEC control over the Board specifically incorporate many of the provisions of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*, that established SEC control over SROs. But the Act also confers additional authorities, thereby giving the SEC uniquely pervasive control over the Board's conduct. The following are the central features of that control:

i. *Rules and Auditing Standards.* When the Board promulgates auditing standards, ethics rules, or other rules, they cannot "become effective without prior approval of the Commission." 15 U.S.C. 7217(b)(2). After the Commission has approved a rule, it may modify or delete the rule in any manner it deems necessary at

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[3] In 2007, NASD and NYSE merged their regulatory functions, with the SEC's approval, and those functions are now exercised by the Financial Industry Regulatory Authority. See 72 Fed. Reg. 42,169 (2007).

any time. 15 U.S.C. 7217(b)(5) (incorporating 15 U.S.C. 78s(c) in modified form).[4]

ii. *Inspections, Investigations, and Sanctions.* When the Board conducts a periodic inspection of an accounting firm under 15 U.S.C. 7214, the firm may seek review by the Commission, under such rules as the Commission may promulgate, of the Board's final inspection report, so long as the firm previously presented to the Board its objections to the Board's draft report. 15 U.S.C. 7214(h). When the Board conducts investigations of registered accounting firms, it must act in accordance with its SEC-approved rules. 15 U.S.C. 7215(b)(1). The Board is required to notify the SEC of any investigations of potential violations of the securities laws, and to coordinate with the SEC to protect any SEC investigation. 15 U.S.C. 7215(b)(4). The Board lacks independent subpoena authority, and must request that the SEC issue a subpoena when the Board seeks to compel documents or testimony from any person. 15 U.S.C. 7215(b)(2)(D).

When the Board seeks to impose a disciplinary sanction, the sanction is subject to *de novo* review by the Commission. 15 U.S.C. 7217(c)(2) (making 15 U.S.C. 78s(d)(2) and (e)(1) applicable in modified form). Any disciplinary action of the Board is automatically stayed upon either application to the SEC for review or the SEC's *sua sponte* initiation of review. 15 U.S.C. 7215(e). The Commission may "enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board" if the Commission concludes that the proposed sanction "is not necessary or appropriate" under the Act

[4] The Board's current rules, as approved by the Commission, are available at PCAOB, *Rules of the Board* (visited Oct. 12, 2009) <http://www.pcaobus.org/Rules/Rules_of_the_Board/index.aspx>.

or the securities laws or is "excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed." 15 U.S.C. 7217(c)(3); see also 15 U.S.C. 7217(c)(2).

iii. *Rescission of the Board's Authority.* The Commission may rescind, in whole or in part, any aspect of the Board's enforcement authority at any time, based on the Commission's judgment of what is necessary to protect the public and advance the purposes of the Act and the securities laws. 15 U.S.C. 7217(d)(1) ("The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this Act and the securities laws, may relieve the Board of *any* responsibility to enforce compliance with *any* provision of this Act, the securities laws, the rules of the Board, or professional standards.") (emphases added); see 15 U.S.C. 7217(d)(2) (authorizing the Commission to censure or impose limitations on the Board).

iv. *Control Over the Board's Funding and Budget.* The Board is generally funded by annual accounting support fees paid by issuers of securities. 15 U.S.C. 7219(a) and (d). Those fees must be approved by the Commission. 15 U.S.C. 7219(d)(1). In addition, the Board's annual budget is subject to the Commission's approval. 15 U.S.C. 7219(b).

v. *Appointment, Censure, and Removal of Board Members.* Members of the Board are appointed for five-year terms by the Commission, after consultation with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury. 15 U.S.C. 7211(e)(4) and (5)(A). The Commission may publicly censure any Board member or remove a Board member "for good cause shown." 15 U.S.C. 7211(e)(6), 7217(d)(3).

vi. *Additional Regulatory and Enforcement Authority of the Commission.* In addition to all of the foregoing specific powers, the Act grants the Commission the overarching authority to adopt "such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act." 15 U.S.C. 7202(a). A violation of the Act, or a Commission or Board regulation issued under the Act, "shall be treated for all purposes in the same manner as a violation of the [Exchange Act]," 15 U.S.C. 7202(b)(1), which means that the Commission can take enforcement action itself if the Board does not, see, *e.g.*, 15 U.S.C. 78u. The Act further specifies that neither the Act nor the Board's rules shall be construed to impair or limit the Commission's own authority to regulate the accounting profession for purposes of enforcement of the securities laws, or to set accounting and auditing standards, or to take, on its own initiative, "legal, administrative, or disciplinary action" against accounting firms registered with the Board. 15 U.S.C. 7202(c); see 15 U.S.C. 7218.

2. Petitioners—a non-profit organization and an accounting firm that is registered with the Board—filed this facial constitutional challenge to the Board's status in the United States District Court for the District of Columbia. Pet. App. 106a-117a. When the complaint was filed, petitioner Beckstead and Watts was the subject of a disciplinary investigation by the Board, after an inspection by the Board had uncovered significant deficiencies in the firm's auditing procedures. J.A. 66.[5]

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[5] See PCAOB, *Release No. 104-2005-082, Inspection of Beckstead & Watts, LLP* 3 (Sept. 28, 2005) <http://www.pcaobus.org/Inspections/Public_Reports/2005/Beckstead_and_Watts.pdf> (identifying "deficiencies" in 8 of 16 audits reviewed that were "of such significance that

In their complaint, petitioners contended that the Act violates the Appointments Clause, separation-of-powers principles, and nondelegation principles. J.A. 67-71; Pet. App. 4a, 106a. The United States intervened to defend the constitutionality of the Act and to argue that the district court lacked jurisdiction because petitioners had failed to follow the exclusive mechanism established by Congress for administrative and judicial review of challenges to the Board's actions. *Id.* at 8a-9a, 106a; Statement of Interest (June 2, 2006); Motion to Intervene (Sept. 1, 2006).

3. The district court concluded that it could exercise jurisdiction over petitioners' suit, stating only that their constitutional challenges are "collateral to the Act's statutory scheme, and are therefore outside the universe of cases subject to the implicitly exclusive administrative review established by the Act." Pet. App. 111a. The court then rejected petitioners' arguments on the merits. *Id.* at 112a-117a. After describing the Commission's comprehensive powers over the Board, *id.* at 107a-109a, the court concluded that petitioners' facial challenge "present[s] nothing but a[] hypothetical scenario of an over-zealous or rogue PCAOB investigator," and that if the scenario were to occur, "the SEC could change the rules to prevent improper investigations or remove PCAOB members for 'good cause.'" *Id.* at 116a-117a.

4. a. The court of appeals affirmed. Pet. App. 3a-104a. The court first concluded that the district court possessed jurisdiction, outside the special statutory procedures for judicial review. The court reasoned that

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it appeared to the inspection team that the Firm did not obtain sufficient competent evidential matter to support its opinion on the issuers' financial statements"). The Board has taken no further action in its investigation of Beckstead and Watts.

those procedures are applicable only to challenges to an "order" or a "rule," *id.* at 9a, and that petitioners' facial challenge to the Act was a collateral claim, which did not attempt to "bootstrap other claims regarding a Board order or rule." *Id.* at 10a. Concluding that the challenge was "not properly viewed as a circumvention of the Act's review procedures," the court held that it could be brought directly in district court. *Id.* at 10a-11a.

On the merits, the court of appeals rejected petitioners' contention that the Act violates the Appointments Clause by vesting the power to appoint Board members in the SEC, rather than in the President with the Senate's advice and consent. Pet. App. 11a-20a. The court emphasized that Board members "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id.* at 13a (quoting *Edmond* v. *United States*, 520 U.S. 651, 665 (1997)). "Because the Board's exercise of its powers under the Act is subject to comprehensive control by the Commission and Board members are accountable to and removable by the Commission," the court concluded that Board members are inferior officers whose appointment Congress could properly vest in the Commission. *Id.* at 20a. The court found no merit in petitioners' claim that the Commission lacks authority to appoint inferior officers because the Commission is not a "Department" for purposes of the Appointments Clause. *Id.* at 20a-23a. It also rejected the contention that the Commission cannot appoint inferior officers because the Commission, as a multi-member body, is not the "Head[]" of the SEC for purposes of the Appointments Clause. *Id.* at 23a-25a.

Turning to petitioners' general separation-of-powers argument, Pet. App. 26a-37a, the court of appeals rejected petitioners' efforts to characterize the Board as

an agency independent of the Commission, *id.* at 29a-30a & n.9, and lacking adequate accountability to the President, *id.* at 26a. The court explained that petitioners' arguments are "undercut by the vast degree of Commission control at every significant step." *Id.* at 36a. Comparing the Commission's "extraordinary," "pervasive," and "exhaustive" (*id.* at 7a, 30a, 39a) control over the PCAOB with the Attorney General's circumscribed authority over the independent counsel in *Morrison* v. *Olson*, 487 U.S. 654 (1988), see Pet. App. 31a-32a, the court concluded that the President's powers over the Board, through the Commission, "extend comfortably beyond the minimum required to 'perform his constitutionally assigned duties.'" *Id.* at 31a (quoting *Morrison*, 487 U.S. at 696).

Especially in light of the Commission's extensive supervision of the Board in other respects, the court of appeals determined that the statutory provisions regarding the Commission's removal of Board members do not violate separation-of-powers principles. The court observed that under this Court's decisions, the President need not have direct removal authority over inferior officers whose appointment Congress has lawfully vested in the Heads of Departments. Pet. App. 17a, 36a. The court further explained that the "good cause" limitation on the Commission's removal of Board members must be read in conjunction with the other, pervasive means of control exercised by the Commission. *Id.* at 30a, 35a-36a. The court concluded: "Given the constitutionality of independent agencies and the Commission's comprehensive control over the Board, [petitioners] cannot show that the statutory scheme so restricts the President's control over the Board as to violate separation of powers." *Id.* at 39a.

b. Judge Kavanaugh dissented. Pet. App. 41a-104a. In his view, the Act violates separation-of-powers principles by "completely strip[ping] the President's ability to remove PCAOB members, either directly or through an alter ego." *Id.* at 66a. He also concluded that the Act violates the Appointments Clause. *Id.* at 80a-97a. According to his opinion, the Board's members are "principal" officers because the SEC cannot remove them at will and because the SEC lacks sufficient statutory authority to prevent, affirmatively command, or manage the ongoing conduct of specific Board inspections, investigations, and enforcement actions. *Id.* at 90a-97a.

Responding to petitioners' argument that the SEC cannot appoint inferior officers because it is not a "Department[]" and its five Commissioners are not the "Head[]" of a Department, Judge Kavanaugh "generally agree[d] with the majority opinion that [petitioners'] submission is inconsistent with current Supreme Court precedents" as well as constitutional "text and long-standing Executive Branch interpretation." Pet. App. 97a n.24.

SUMMARY OF ARGUMENT

I. Petitioners ask this Court to resolve claims that Congress has required to be presented in the first instance to the SEC, under special procedures, with subsequent judicial review in a court of appeals. Bypassing those procedures, petitioners filed this district court action, seeking to enjoin a pending Board investigation and to vacate prior Board actions in that investigation. Bedrock principles of administrative law preclude that course, which deprived the SEC of the opportunity to address statutory questions embedded in petitioners' constitutional claims.

That petitioners' primary ground for seeking declaratory and injunctive relief was their challenge to the constitutionality of the Board's authority does not excuse their noncompliance with statutory review procedures. A party must follow such procedures even when asserting a constitutional claim that cannot be resolved by an agency, provided (as here) that those procedures ensure a meaningful opportunity for judicial review once administrative review is complete. See *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 215 (1994).

II. Petitioners contend that Sarbanes-Oxley violates the Appointments Clause by vesting the power to appoint Board members in the SEC rather than in the President with the Senate's advice and consent. That argument is incorrect.

A. The Commission comprehensively supervises and controls members of the Board. The Commission controls the Board in all the ways it does SROs, while also possessing yet additional authorities and the power to appoint Board members. Thus, the Commission can reject, modify, or supplant every procedural or substantive rule the Board adopts; it can refuse to issue a subpoena in aid of a Board investigation; it can reverse, veto, or set aside any of the Board's enforcement decisions; it can take enforcement action itself when the Board does not; it can disapprove or control any Board litigation; it can disapprove the Board's budget; it can remove Board members for cause; and it can entirely withdraw any aspect of the Board's enforcement authority.

B. Petitioners are therefore mistaken in contending that Board members are principal officers who must be appointed by the President and confirmed by the Senate. In fact, Board members are inferior officers, be-

cause their "work is directed and supervised at some level by others"—SEC Commissioners—"who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond* v. *United States*, 520 U.S. 651, 663 (1997). The Board members' inferior status is demonstrated by comparison to the Coast Guard judges in *Edmond*, and the special tax judges in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), all of whom were subject to less comprehensive and effective supervision than Board members and yet were held to be inferior officers. The SEC's inability to remove Board members at will does not alter the superior–inferior nature of the relationship between them. Neither does the Board's statutory authority to fund its operations through user fees, which the Commission must approve.

C. Petitioners further contend that, if Board members are inferior officers, they cannot be appointed by the SEC because the Commission is not a "Head[] of Department[]" for Appointments Clause purposes. Although the *Freytag* majority expressly declined to resolve whether "Departments" are limited to Cabinet agencies, four concurring Justices persuasively explained that the SEC and other principal non-Cabinet agencies are indeed "Departments." See 501 U.S. at 918-920 (Scalia, J., concurring in part and concurring in the judgment). Moreover, petitioners err in arguing that the "Head[]" of the SEC is the Chairman alone rather than the full Commission. It is the Commissioners as a body who exercise the final rulemaking, investigative, and adjudicative authority that the securities laws vest in the SEC, and who also exercise control over the Board.

III. Petitioners contend that the President lacks adequate control over the Board's exercise of Executive

power, either because he cannot directly remove Board members under any standard or because the Commission cannot remove them at will. But no decision of this Court has ever suggested that the President must have direct removal authority over inferior officers. And in the circumstances of this statutory scheme, the limits on the Commission's removal authority pose no constitutional concern. Petitioners do not dispute the constitutionality of "independent" agencies generally, *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), or of the SEC's ability to enforce the securities laws (including Sarbanes-Oxley). Nor do petitioners dispute that Congress may provide that inferior officers within Executive agencies may be removed only for cause. *E.g.*, *Myers* v. *United States*, 272 U.S. 52, 161 (1926). Here, Congress has included such a removal provision in the context of an overall regulatory structure that subjects the Board to the Commission's plenary control. In a world in which *Humphrey's Executor* remains good law, this set of statutory provisions gives the President constitutionally sufficient control over the Board's activities. Moreover, even when viewed in isolation, the Commission's power to remove Board members is broader than petitioners suggest—and should be so read in the course of resolving petitioners' constitutional challenge. Finally, this case does not involve any attempt by Congress to aggrandize its own power at the Executive's expense. To the contrary, this case at bottom involves authority Congress has possessed since *Humphrey's Executor*, and this Court should affirm the decision below on that basis.

ARGUMENT

I. SPECIAL STATUTORY REVIEW PROCEDURES BARRED THE DISTRICT COURT FROM EXERCISING JURISDICTION OVER PETITIONERS' CHALLENGE

A. Since the enactment of the Exchange Act in 1934, the federal securities laws have provided an exclusive mechanism for parties aggrieved by the actions of SROs to obtain judicial review. In creating the Board, Congress expressly made such review procedures applicable to the Board. See, *e.g.*, 15 U.S.C. 7217(b)(4) and (c) (applying provisions of 15 U.S.C. 78s in modified form).

The applicable procedures, set forth in the Exchange Act, 15 U.S.C. 78s(b) and 78y(a)-(b), guarantee the Commission an opportunity to address relevant legal issues in an authoritative order or ruling, which is then subject to direct review in a court of appeals. 15 U.S.C. 78y(a)(1) and (b)(1). To preserve the integrity of that exclusive review procedure, the Exchange Act further provides that "[n]o objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so." 15 U.S.C. 78y(c)(1). As this Court has explained, "where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965); see, *e.g.*, *NASD* v. *SEC*, 431 F.3d 803, 806-808 (D.C. Cir. 2005) (discussing administrative and judicial review of NASD disciplinary orders); *Swirsky* v. *NASD*, 124 F.3d 59, 62-64 (1st Cir. 1997) (same); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *NASD*, 616 F.2d 1363,

1370 (5th Cir. 1980) (same); *First Jersey Sec., Inc.* v. *Bergen*, 605 F.2d 690, 696 (3d Cir. 1979) (same), cert. denied, 444 U.S. 1074 (1980).

Petitioners, however, bypassed both the Commission and review in the court of appeals, instead filing their challenge to the Board's authority directly in district court. When the complaint was filed, petitioner Beckstead and Watts was the subject of a disciplinary investigation by the Board. J.A. 66. In their district court action, petitioners sought an injunction barring the Board from "taking any further action against" Beckstead and Watts and an order "nullifying and voiding any prior adverse action against" the firm. J.A. 71. Petitioners alleged that the Board's ongoing investigation was subjecting Beckstead and Watts to "burdensome discovery" and legal fees, J.A. 66; that the firm had been "injured by the Board's auditing standards, which ha[d] substantially increased the time and expense of its public company audits and reduced both its client capacity and its overall profits[;] and that the Board's inspection report ha[d] damaged its professional reputation," Pet. App. 110a; see J.A. 63, 65-66.

Under the Act, petitioners had multiple options for obtaining administrative—and then judicial—review of adverse Board actions or purported deficiencies in the Board's auditing standards. To the extent that they objected to the auditing standards, registration requirements, or other rules, see J.A. 65-66, petitioners could have sought review of those rules by the Commission, in which proceeding they could have raised relevant statutory and constitutional objections, and then they could have sought judicial review. See 15 U.S.C. 7217(b)(4); 15 U.S.C. 78s(b)(1), 78y(b). Likewise, to the extent petitioner Beckstead and Watts might object to any sanction

ultimately imposed by the Board for violations of applicable auditing standards, the firm could seek *de novo* review by the Commission, asserting constitutional as well as other objections, and then seek judicial review in the court of appeals. See 15 U.S.C. 7217(c)(2); 15 U.S.C. 78s(d)(2), 78y(a). And Beckstead and Watts (or any other firm) could challenge the Board's authority to conduct an inspection or investigation by refusing to comply and raising its constitutional challenges before the Commission and then a court in a disciplinary action brought by the Board for violating requirements that a registered firm cooperate with any inspection or investigation. See 15 U.S.C. 7212(b)(3), 7215(b)(3).[6] Instead, petitioners filed this facial challenge directly in district court, asking the court to enjoin the ongoing investigation of Beckstead and Watts and to "nullify[] and void[]" prior Board actions against the firm. J.A. 71.

That course is contrary to bedrock principles of judicial review of administrative action. A plaintiff's desire to present constitutional challenges to an agency's authority to take an action does not permit the plaintiff to disregard the statutory review procedures established

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[6] Petitioners are wrong to suggest that Beckstead and Watts could not have raised constitutional objections to the Board's authority on judicial review of the Commission's final action because "the Board is not the proper respondent" in a suit challenging such action. Cert. Reply Br. 3. A Commission rule or order approving an action of the Board would implicate the Board's constitutional authority to act in the first place, and a court therefore could address constitutional challenges to the Board in that context. See *Sorrell* v. *SEC*, 679 F.2d 1323, 1325-1326 (9th Cir. 1982) (rejecting argument on petition for review of SEC order that statute authorizing NASD violated nondelegation doctrine); *R.H. Johnson & Co.* v. *SEC*, 198 F.2d 690, 695 (2d Cir.) (same), cert. denied, 344 U.S. 855 (1952); cf. 15 U.S.C. 7202(b)(1) (violations of Board's rules are deemed violations of Exchange Act).

by Congress for the review of such an action. As this Court explained in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), even when an agency cannot itself rule on the merits of a constitutional challenge, a regulated firm cannot bypass exclusive administrative review procedures established by Congress if the constitutional claims can be "meaningfully addressed in the Court of Appeals" after the administrative review. *Id.* at 215. Because judicial review of constitutional claims—including separation-of-powers claims—is available on a petition for review of a decision of the Commission, petitioners were not free to forgo that route in favor of a direct facial challenge in district court. See, *e.g.*, *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 104-106 (1946) (addressing a structural nondelegation claim on review from SEC); *Blinder, Robinson & Co.* v. *SEC*, 837 F.2d 1099, 1103-1109 (D.C. Cir.) (addressing separation of powers, structural due process, and Fourth Amendment arguments), cert. denied, 488 U.S. 869 (1988); *Sorrell* v. *SEC*, 679 F.2d 1323, 1325-1326 (9th Cir. 1982) (addressing nondelegation challenge to NASD); *R.H. Johnson & Co.* v. *SEC*, 198 F.2d 690, 695 (2d Cir.) (same), cert. denied, 344 U.S. 855 (1952); see also *First Jersey Sec.*, 605 F.2d at 696 (directing dismissal, for failure to exhaust administrative remedies, of nondelegation claim against NASD).

In *Thunder Basin*, adherence to the statutory requirements for administrative review in the first instance allowed subsequent judicial review to be informed by "'agency expertise * * * brought to bear on' the statutory questions presented." 510 U.S. at 215 (quoting *Whitney Nat'l Bank*, 379 U.S. at 420); *United States* v. *Ruzicka*, 329 U.S. 287, 294 (1946) (administrative review of legal challenges is required because,

"[e]ven when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the * * * industry"). The same is true in this case, rendering review by the Commission especially important.

Petitioners' facial constitutional challenge to the Board's authority depends upon the answers to several questions of statutory interpretation, relating to the extent of the Commission's supervision and control over the Board's regulations, sanctions, inspections, and investigations, and the scope of the Commission's authority to remove the Board's members. Petitioners' constitutional arguments are premised on the answers they have advanced to those questions—*e.g.*, their mistaken insistence (Br. 4) that "the SEC exercises no control over the conduct of the Board's regular inspections" and that the SEC is "*required*" to approve Board rules in certain circumstances. To the extent that the Board, and the Commission on review, interpreted and applied the Act in ways contrary to petitioners' claims—thereby evidencing the Commission's control over the Board's actions in the context of a concrete case—petitioners' constitutional challenge to the Act would appear in a very different and far less congenial light.

Moreover, in exercising its responsibilities to construe the Act when reviewing a concrete action of the Board, the Commission could, if necessary, do so in a manner that would avoid rather than create constitutional difficulties. See *Ohio Civil Rights Comm'n* v. *Dayton Christian Sch., Inc.*, 477 U.S. 619, 629 (1986) ("[I]t would seem an unusual doctrine * * * to say that [an agency] could not construe its own statutory mandate in the light of federal constitutional principles."). In so doing, the Commission would act in accordance

with this Court's repeated stricture that in "choosing between competing plausible interpretations of a statutory text," an interpretation should rely on the "reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Hawaii* v. *Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1445 (2009) (quoting *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005)). By contrast, as the court of appeals observed, the arguments petitioners advanced in this direct challenge in district court require "interpret[ing] the Commission's powers of oversight narrowly, and the limitations attendant to for-cause removal broadly, divorced from their statutory context in a manner to create constitutional problems where there are none." Pet. App. 39a (citations omitted); *id.* at 18a ("[T]he Commission could broadly interpret its removal authority in order to ensure that the Board conforms to its policies."). Petitioners' tactics in bypassing the Commission thus detach constitutional adjudication from its appropriate statutory grounding in precisely the way *Thunder Basin* intends to prevent.

B. Petitioners' suit is not, as the court of appeals believed, "collateral to the Act's administrative review scheme." Pet. App. 11a. The object of the suit is specifically to preempt the Board's investigation of Beckstead and Watts's compliance with the Act and the Board's standards. J.A. 63-66. And petitioners' alleged injuries derive entirely from the claim that the Board's auditing standards and inspections have imposed compliance costs on auditors that threaten "[s]maller accounting firms," extend further than "existing professional standards," and do not adequately "benefit[] * * * the investing public." J.A. 63, 65. The Commission could fully address all of these concerns during administrative re-

view, rendering it the appropriate initial decisionmaker. Moreover, petitioners' substantive objections to the Board's actions are intimately tied to their constitutional challenges, which are founded on the proposition (Br. 1, 7, 30, 43) that the Board is too free from political accountability to make policy decisions. For this reason too, petitioners should be required to use the review scheme that Congress established.

In cases in which this Court has permitted constitutional challenges to be brought directly in district court, without full exhaustion of an administrative review procedure, one of two circumstances was present: either no issues remained that fell within the agency's competence to address, see *Mathews* v. *Diaz*, 426 U.S. 67, 75-77 (1976), or meaningful judicial review of constitutional claims would otherwise have been entirely unavailable, see *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-498 (1991); *Mathews* v. *Eldridge*, 424 U.S. 319, 330-332 (1976); *Johnson* v. *Robison*, 415 U.S. 361, 366-374 (1974). Neither is the case here. The Commission is competent to address the substance of the Board's actions as well as the scope of the Commission's own statutory authorities to control and supervise Board members and their actions. And petitioners' constitutional claims could "be meaningfully addressed in the Court of Appeals," after the Commission's consideration. *Thunder Basin*, 510 U.S. at 215.

C. Permitting petitioners to bypass the review procedures established by Congress would be particularly anomalous here because petitioners have identified no Act of Congress that permits their challenge to proceed in district court. Because the Board is deemed not to be, for statutory purposes, "an agency or establishment of the United States Government," 15 U.S.C. 7211(b), peti-

tioners cannot rely on the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, or any other statutory mechanism providing for suits against the government. See *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (Congress's characterization of an entity as non-governmental is "assuredly dispositive * * * for purposes of matters that are within Congress's control," including "whether [the entity] is subject to statutes * * * such as the Administrative Procedure Act").[7]

Petitioners have contended that the courts should imply a cause of action directly under the Constitution to permit suit outside the statutory review procedures. Pet. C.A. Reply Br. 22. But this Court is always reluctant to "imply a cause of action where Congress has not provided one," and it has refused to do so even when—unlike here—there is "no opportunity to fully remedy [a] constitutional violation" or no "other means for challenging a constitutional deprivation in federal court." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 n.3, 68, 69 (2001); see *Seminole Tribe* v. *Florida*, 517 U.S. 44, 73-74 (1996). Still less should the Court take this path when petitioners have an available mechanism to raise their constitutional claims.

Indeed, petitioners have not pointed to any case in which this Court has recognized an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles. This Court has considered such challenges only as and when they arose through established statutory mechanisms or as de-

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[7] Even were the APA somehow to apply, the Board's *initiation* of an inspection or investigation of Beckstead and Watts does not constitute "final agency action" that would be subject to immediate judicial review under the APA. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 238 (1980).

fenses to enforcement actions. *E.g.*, *Edmond* v. *United States*, 520 U.S. 651, 655 (1997) (appeal from decisions affirming convictions by courts-martial); *Freytag* v. *Commissioner*, 501 U.S. 868, 871-873 (1991) (appeal from adverse decision of Tax Court); *Morrison* v. *Olson*, 487 U.S. 654, 668-669 (1988) (appeal from order denying motion to quash subpoena); *Bowsher* v. *Synar*, 478 U.S. 714, 719 (1986) (special statutory review procedure); *INS* v. *Chadha*, 462 U.S. 919, 928, 937-939 (1983) (petition for review of deportation order); *Myers* v. *United States*, 272 U.S. 52 (1926) (suit by dismissed officer for unpaid salary); *United States* v. *Germaine*, 99 U.S. 508 (1879) (appeal from criminal conviction involving defendant's status as "officer" as element of crime).

In sum, petitioners failed to pursue the express statutory mechanism that Congress established for challenges to the Board's actions, and the district court could not properly exercise jurisdiction over their suit.

II. CONGRESS VALIDLY VESTED THE APPOINTMENT OF MEMBERS OF THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD IN THE SECURITIES AND EXCHANGE COMMISSION

Congress may "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, Cl. 2. Petitioners argue (Br. 43-62) that Congress could not authorize the Commission to appoint the Board's members for three reasons: because Board members are principal rather than inferior officers; because the Commission is not a Department for purposes of the Appointments Clause; and because, even if the Commission is a Department, the Chairman, not the Commission as a whole, is its Head. Petitioners

rely primarily on the first of those contentions, arguing that Board members exercise authority comparable to that of the SEC Commissioners themselves—an argument that overlaps conceptually with their separation-of-powers claim (Br. 11-35) that the President lacks sufficient control, through the Commission, over the Board's actions. Because petitioners' misconceptions about the Board and its relationship to the Commission are crucial to their arguments under both the Appointments Clause and separation-of-powers principles, we begin by explaining the comprehensive nature of the Commission's supervision and control over the Board.

A. Congress Vested The SEC With Comprehensive Supervision And Control Over Board Activities

Congress created the PCAOB as part of its response to the Enron and Worldcom debacles. In doing so, Congress built upon the SEC's prior experience with SROs like the NASD and the NYSE. Incorporating and adapting pre-existing statutory provisions that govern the SEC's extensive involvement with SROs, Congress established a regime in which the SEC would comprehensively supervise and control the Board's activities.

1. SROs have regulated the securities markets with implicit or explicit government involvement since the so-called Buttonwood Tree Agreement of 1792. See generally *Gordon* v. *NYSE*, 422 U.S. 659, 663-667 (1975). Federal law has recognized such organizations, and their unique role in federal securities regulation, since the Exchange Act first required registration of national securities exchanges and provided for SEC supervision of their activities. *E.g.*, 15 U.S.C. 78f. Shortly thereafter, Congress authorized the creation of "registered securities associations" to prescribe and enforce ethics

standards in the securities industry, subject to SEC oversight and control. Act of June 25, 1938, ch. 677, 52 Stat. 1070 (15 U.S.C. 78*o*–3).

Congress thus adopted a program of "cooperative regulation," in which regulation of the securities industry would "be largely performed by representative organizations of investment bankers, dealers, and brokers, with the Government exercising appropriate supervision in the public interest, and exercising supplementary powers of direct regulation." S. Rep. No. 1455, 75th Cong., 3d Sess. 4 (1938). Accordingly, "[a] statutory system authorizing self-regulatory organizations to act as quasi-governmental agencies in disciplining members for federal securities law violations has existed for [over] 70 years." *NASD* v. *SEC*, 431 F.3d at 804.

Under the Exchange Act, SROs have "no authority to regulate independently of the SEC's control." *NASD* v. *SEC*, 431 F.3d at 807 (quoting S. Rep. No. 75, 94th Cong., 1st Sess. 23 (1975)). As this Court noted in *Gordon*, the SEC exercised such "overriding supervision" over the fixed-commission practices of securities exchanges that those practices were immune from scrutiny under the antitrust laws. 422 U.S. at 661, 691; see *id.* at 685 (noting the SEC's "direct regulatory power over exchange rules and practices" and its "active role in review[ing]" them). This level of supervision applied not only to those particular practices, but to the exchanges' other regulatory activities.

2. Confronted with a widening crisis of confidence in the securities markets in 2002, Congress adapted familiar means of regulation to the problems presented by the accounting industry. In establishing the PCAOB as part of a new regulatory regime, Congress enacted extensive measures to ensure that the Board is in every

respect subordinate to the Commission. Under Sarbanes-Oxley, the Commission controls the Board in all the ways it does SROs, while also possessing additional authorities over the Board and the power to appoint Board members. See pp. 4-7, *supra*.

The Board's rules—which set out the basic framework for the Board's actions and govern, among other things, how it conducts its inspection and investigative functions—do not become effective without the Commission's approval, and the Commission may amend or abrogate those rules at any time. 15 U.S.C. 7201(13), 7211(g)(1), 7214(c), 7215(b)(1), 7217(b)(2) and (5); see, *e.g.*, 69 Fed. Reg. 29,150 (2004) (SEC order approving Board's proposed rules governing investigations and adjudications); *id.* at 31,850 (SEC order approving Board's proposed rules governing inspections). Similarly, when the Board imposes a sanction for violating a rule or the Act, an aggrieved person has a right to obtain *de novo* review by the Commission, and the Commission may also review such a sanctions order on its own motion. 15 U.S.C. 7217(c)(2). The Commission thus has the authority to review, reject, or modify all actions of the Board that have legal effect on the primary conduct of private parties—both rules and disciplinary orders—before those actions may become effective. See 15 U.S.C. 7217(b)(2), (4), and (c)(2).

The Board also has no subpoena power of its own. It must seek issuance of a subpoena by the Commission to require testimony or production of documents the Board considers relevant to an investigation, 15 U.S.C. 7215(b)(2)(D), thereby ensuring Commission control over investigative steps that impose obligations on private parties. And the Board's conduct of litigation in

any court must also be "with the approval of the Commission." 15 U.S.C. 7211(f)(1).

Petitioners complain that the Commission "exercises no control over Board members' daily exercise of their prosecutorial discretion" and cannot "proactively prescribe how Board members *should* act, particularly in case-specific enforcement." Br. 54, 55. But in fact the Commission has full authority to prescribe such details if and to the extent the Commission thinks appropriate. The Commission could, for example, amend the rules that govern how the Board carries out its functions by including requirements that it secure SEC approval for any actions that it now may take itself (such as the decision to initiate an investigation or not to impose a sanction). And quite aside from adopting additional pre-approval requirements, the Commission now may exercise the power either to negate a sanction decision of the Board, or to override a "no sanction" decision (Pet. Br. 56), by exercising its own enforcement powers, which extend to all violations of the Act, the Board's rules, and the SEC's rules and regulations. 15 U.S.C. 7202(b)(1). The Commission thus has multiple ways of controlling the Board's enforcement decisions in individual cases.

In addition to possessing such formal mechanisms of control, the Commission involves itself in the day-to-day activities of the Board in a multitude of informal ways. The Commission has charged its Office of the Chief Accountant with primary responsibility for overseeing the Board's work, and in practice that office works closely with the Board's staff during all of its rulemaking proceedings. Office of the Inspector Gen., SEC, *Audit No. 412, Audit of Oversight of PCAOB* 2, 3 (Sept. 22, 2006) <http://www.sec-oig.gov/Reports/AuditsInspections/2006/412final.pdf>. In a 2006 audit of the Commission's

oversight of the Board, the Chief Accountant explained that his office "not only analyzes and comments on the PCAOB's professional standards and rules," but also "work[s] with the Commission's other offices and divisions to oversee virtually every aspect of the PCAOB's operations." *Id.* App. 1. Similarly, the Board has explained that its "staff works closely with the SEC Division of Enforcement to coordinate many investigations." PCAOB, *2008 Annual Report* 13 (2009) <http://www.pcaobus.org/About_the_PCAOB/Annual_Reports/2008.pdf>.

Finally, the Commission's power to rescind, in whole or in part, any aspect of the Board's enforcement authority at any time, is sweeping and extraordinary. See 15 U.S.C. 7217(d)(1) ("The Commission, by rule, * * * may relieve the Board of any responsibility to enforce compliance with any provision of this Act, the securities laws, the rules of the Board, or professional standards."). Indeed, the court of appeals aptly described that authority as "at-will removal power over Board functions." Pet. App. 35a.

3. The extent of the Commission's authority is underscored by its powers on budgetary matters. The Commission possesses the authority to approve the Board's budget, including the amount of the annual accounting support fee that the Board charges to fund its operations. 15 U.S.C. 7219(b) and (d). In exercising that authority, the Commission has, for example, required that the Board's budget adhere to guidance and economic assumptions provided in advance by Commission staff. See 71 Fed. Reg. 41,998, 41,999 (2006). It has curtailed the Board's ability to reprogram funds for purposes that the Commission has not approved in advance. *Id.* at 42,000. It has restricted Board members' ability

to increase their own salaries. 72 Fed. Reg. 73,052 (2007). And it has required the Board to provide the Commission annually with a written budget "justification" that describes exactly how the Board's budget priorities will advance the purposes of the Act. 71 Fed. Reg. at 41,999.

The Commission's control over the Board's budget occurs on an ongoing basis and is not confined to review of the Board's final proposals. As the Commission explained when it formalized its budget approval procedures, the SEC's Commissioners and staff had already established a practice of meeting regularly with Board members and staff to discuss matters related to the budget. 71 Fed. Reg. at 41,999. The Commission thus uses its power over the Board's purse to facilitate and enhance its control over the Board's regulatory and enforcement functions.

B. Unlike The SEC Commissioners Who Oversee Their Activities, Board Members Are Not Principal Officers

1. Petitioners' invocation of the Appointments Clause rests on the mistaken premise that the Board's members are principal officers who wield power comparable to that of the SEC Commissioners and therefore must be appointed by the President by and with the advice and consent of the Senate.[8] As the Court emphasized in *Edmond*, the constitutional term "inferior" provides important instruction in demarcating the line between principal and inferior officers. "Generally speak-

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[8] It is undisputed that "the Board is a government actor for constitutional purposes," and that its members are Officers of the United States for purposes of the Appointments Clause. Pet. Br. 9 n.1 (citing *Lebron*, 513 U.S. at 400; *Buckley* v. *Valeo*, 424 U.S. 1, 137-140 (1976) (per curiam)).

ing, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior." 520 U.S. at 662. An officer is thus inferior for purposes of the Appointments Clause if his "work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663. Under that principle, it is plain that Board members, unlike SEC Commissioners, are inferior officers. Board members are, in *Edmond*'s terms, "directed and supervised at some level" by the Commission; indeed, that phrasing substantially understates the extent of SEC control. As explained above, and as the court of appeals concluded, "[t]he Commission's authority over the Board is explicit and comprehensive. Indeed, it is extraordinary." Pet. App. 7a (citation omitted).

The "inferior" status of Board members for Appointments Clause purposes is demonstrated by comparison to *Edmond* and *Freytag*. In *Edmond*, civilian appointees to the Coast Guard Court of Criminal Appeals enjoyed substantial independence in the conduct of their offices. Supervisory authority over those judges was divided between the Judge Advocate General, who exercised administrative oversight, and the Court of Appeals for the Armed Forces (CAAF), which reviewed a subset of the judges' decisions. See 520 U.S. at 664-665. As this Court noted, the judges could not be directed to decide particular cases in particular ways in the first instance, enjoyed highly deferential review by the CAAF, and could not be removed based on their rulings in individual cases. See *ibid.* The Court nonetheless held that the judges were inferior officers. *Id.* at 666.

This Court also held that the special tax judges in *Freytag* were inferior officers, despite the "significant discretion" they enjoyed in conducting trials, ruling on evidentiary objections, and enforcing compliance with discovery orders—all without direct oversight. 501 U.S. at 881-882. In cases involving declaratory judgments or small sums, moreover, the special tax judges rendered final decisions, subject to further review only by Article III courts. *Id.* at 873, 881-882.

Unlike the oversight involved in *Edmond* and *Freytag*, the SEC's powers of supervision and control over the Board are neither limited nor deferential. The Commission can reject, modify, or supplant every procedural or substantive rule the Board proposes to adopt; it can refuse to issue a subpoena in aid of a Board investigation; it can reverse, veto, or set aside every enforcement decision the Board makes; it can take enforcement action itself if the Board declines to do so; it can disapprove or control any Board litigation; it can remove Board members for cause; and it can entirely withdraw any aspect of the Board's enforcement authority under Sarbanes-Oxley. Because the Commission must approve all Board rules and all appealed Board disciplinary sanctions and has complete authority to modify or reject the Board's rules and orders, the Board's members "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive Officers." *Edmond*, 520 U.S. at 665.

Neither the Coast Guard judges in *Edmond* nor the special tax judges in *Freytag* labored under control nearly so pervasive, and yet they were deemed inferior officers. As noted, the CAAF reviewed only a subset of decisions of the Coast Guard judges, see *Edmond*, 520 U.S. at 664-665, and judges of the Tax Court similarly

had no authority to review many decisions of the special tax judges, see *Freytag*, 501 U.S. at 881-882. By contrast, no decisions of the Board are beyond the Commission's plenary review. And the standard of review the Commission wields is stricter. While the CAAF afforded deferential review to decisions of the Coast Guard judges, see *Edmond*, 520 U.S. at 665 ("So long as there is some competent evidence in the record to establish each element of the offense beyond a reasonable doubt, the Court of Appeals for the Armed Forces [would] not reevaluate the facts."), the Commission's review of Board decisions entails *de novo* consideration of both legal and factual questions. See 15 U.S.C. 7217(c)(2); *NASD* v. *SEC*, 431 F.3d at 804; *Shultz* v. *SEC*, 614 F.2d 561, 568 (7th Cir. 1980).[9]

2. The statutory and regulatory provisions subordinating the Board to the Commission are flatly at odds with petitioners' assertion (Br. 48) that "every defining attribute of the Board demonstrates that it is an independent entity with an autonomy and authority" of such a degree that its members must be appointed by the President with the advice and consent of the Senate. Indeed, as the court of appeals observed, petitioners have been unable to identify any instance "in which the Board can make policy that the Commission cannot override," or in which the Board can take a final action or impose a sanction that is not subject to *de novo* review by the Commission. Pet. App. 38a-39a.[10]

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[9] As discussed below (at pp. 49-50, *infra*), the Commission also has greater control over the Board than the Attorney General had over the independent counsel who was found to be an inferior officer in *Morrison*, 487 U.S. at 671-673.

[10] Petitioners err in describing the Commission's oversight of the Board as purely "passive" review limited to "veto[ing] mistakes" after

Petitioners' contention that Board members cannot be inferior officers because they are not removable at will by the SEC (Br. 46) is irreconcilable with this Court's precedents. The independent counsel in *Morrison* enjoyed "for cause" removal protection but was nonetheless an inferior officer. 487 U.S. at 663. Indeed, as the Court there noted, the power of a principal officer (the Attorney General) to remove the independent counsel—even though for cause—counted as an important factor supporting inferior-officer status. *Id.* at 671; see also *Bowsher*, 478 U.S. at 729 (good-cause removal provision was broad enough to encompass "any number of actual or perceived transgressions"). At the least, a for-cause-removal provision does nothing to call into question the Commission's ability to exercise its other considerable authorities over the Board. See *Applicability of Exec. Order No. 12674 to Personnel of Reg'l Fishery Mgmt. Councils*, 17 Op. Off. Legal Counsel 150, 156 & n.19 (1993) ("[C]ase law clearly supports the view that 'for cause' limitations on removal power can be compatible with the continuing power and duty to supervise."). Such a provision therefore does not undermine the inferior status of Board members under *Edmond*.

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the fact. Br. 55 (emphasis omitted). The Commission, for example, can request a special inspection to be performed by the Board outside its regular schedule, 15 U.S.C. 7214(b)(2); amend regulations governing the Board's performance of its functions, or refuse to approve those regulations before they become effective, 15 U.S.C. 7217(b)(5); take enforcement action if the Board has not, 15 U.S.C. 7202(b)(1); and make use of regular consultative procedures to influence the Board's operations in real time. In any event, as *Edmond* makes clear, the Board's inability to render a *final* decision on behalf of the Executive Branch unless "permitted to do so by other Executive Officers" is itself indicative of inferior, not principal, officer status. 520 U.S. at 665.

The contention that inferior officers must be removable at will by a principal officer is also at odds with repeated statements of this Court that Congress may place at least some restrictions on the removal of inferior officers whose appointment Congress has lawfully vested in Courts of Law or Heads of Departments. See *Morrison*, 487 U.S. at 689 n.27; see also *id.* at 723-724 (Scalia, J., dissenting) (describing as "established" the proposition that the President's power "to remove inferior officers who exercise purely executive powers, and whose appointment Congress [has] removed from the usual procedure of Presidential appointment with Senate consent, could be restricted, at least where the appointment had been made by an officer of the Executive Branch"); *Myers*, 272 U.S. at 161-162 ("Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal."); *United States* v. *Perkins*, 116 U.S. 483, 485 (1886) (authority to vest appointment of inferior officers in the heads of departments implies the authority to impose restrictions on removal).

Petitioners' comparison of the power exercised by PCAOB members to that of the judges of lower federal courts (Br. 54), the Secretaries of the Army and Navy, and the heads of the CIA, IRS, FDA, and FAA (Br. 51), underscores the subordinate status of the Board. Assuming *arguendo* that the officers petitioners identify are not inferior officers, no person or entity enjoys express statutory control over them that is remotely analogous to the comprehensive control that the Commission exercises over the Board—including but not limited to review of every action having legal effect on primary

conduct. Final judgments of district court judges may be subject to appellate review, but no court of appeals is empowered permanently to withdraw any aspect of the district court's substantive authority at any time, and district court decisions are not automatically stayed pending review, as are the Board's proposed rules and sanctions orders. See 15 U.S.C. 7215(e)(1); 15 U.S.C. 7217(b)(2) and (d)(1). Nor, needless to say, may the courts of appeals on their own initiative overturn an unappealed ruling of a district court, impose their own sentence, make their own factual findings, restrict the district court's budget, or inspect the district court's internal records. Likewise, although the Secretary of the Army, the Director of the CIA, the Administrator of the FDA, and the other Executive officers cited by petitioners are subordinate in some respects to other Executive officers, they generally enjoy broad discretion and authority under law to make final decisions on behalf of the Executive Branch. See, *e.g.*, 10 U.S.C. 3013; 21 U.S.C. 393(d); 26 U.S.C. 7803(a); 50 U.S.C. 403–4a.

Petitioners improbably attribute (Br. 49) to the Board the power to levy a "direct[] *tax*" on the public "without any input by the people's representatives." In fact, the statutory provision at issue, which provides for the funding of the Board's operations through a "reasonable annual accounting support fee" paid by issuers of securities, requires the Commission to approve those fees annually, 15 U.S.C. 7219(d)(1), and the Act sets out the formula by which the fee for particular classes of issuers is to be calculated, 15 U.S.C. 7219(g). Contrary to petitioners' view, such user fees are neither particularly uncommon nor constitutionally troublesome. See generally *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 340-341 (1974) (distinguishing be-

tween Congress's power to levy taxes and federal agencies' ability to "exact a fee" that is "incident to a voluntary act," such as "a request that a public agency permit an applicant to practice law or medicine"); 3 Office of Gen. Counsel, U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law* 12-145 to 12-146 (3d ed. 2008) (describing how user fees "mushroomed" after 1980 and many agencies in the 1990s "became increasingly more reliant upon user fees, over general tax revenues, to fund their programs and operations"); see also, *e.g.*, 21 U.S.C. 379h (FDA user fees); 42 U.S.C. 2214 (NRC user fees).

Finally, petitioners misapprehend a crucial feature of a superior–inferior relationship when they suggest that the Commission's power to revoke the Board's authority (see 15 U.S.C. 7217(d)(1)) is immaterial because "wholly *unexercised*." Br. 56. Such power is, of course, no less real simply because the Commission so far has not needed to exercise it. As is true of the "presumed desire to avoid removal" from office, the prospect that significant power could be withdrawn from the Board at any time suffices to create a "here-and-now subservience." *Bowsher*, 478 U.S. at 727 n.5 (quoting *Synar* v. *United States*, 626 F. Supp. 1374, 1392 (D.D.C. 1986)); see also *ibid.* ("The Impeachment Clause of the Constitution can hardly be thought to be undermined because of nonuse."). Indeed, the nonuse of such a provision may be powerful evidence of its effectiveness in keeping a subordinate in line.[11]

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[11] Equally immaterial is the amount of the Board members' salaries. See Pet. Br. 49-50. Congress created the Board as a private (nonprofit) corporation in the belief that higher salaries would attract qualified candidates from the private sector, but granted the Commission complete control over salaries through the power to approve the Board's budget.

C. The Commission Is A "Department" Within The Meaning Of The Appointments Clause, With The Commissioners As Its "Head"

Petitioners argue that Congress could not authorize the Commission to appoint inferior officers because the Commission is not a "Department" (Br. 57-59), and the Commissioners are not its "Head" (*id.* at 60-62). Both of those contentions fail for the reasons articulated by the majority and dissenting opinions in the court of appeals.

1. Near the time of the Founding, the term "department" referred to a "separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person." *Freytag*, 501 U.S. at 920 (Scalia, J., concurring in part and concurring in the judgment) (quoting 1 Noah Webster, *American Dictionary of the English Language* 58 (1828)). The Court has long recognized that, as used in the Appointments Clause, the term "has reference to the subdivision of the power of the Executive into departments, for the more convenient exercise of that power." *Germaine*, 99 U.S. at 510.

Like Cabinet officers, the SEC is subject only to the oversight of the President, without being subordinated to (or contained within) another component of the Executive Branch. Like Cabinet officers, SEC Commissioners are appointed by the President by and with the advice and consent of the Senate. See 15 U.S.C. 78d(a). Moreover, nobody from outside the Commission has

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Board members are thus ultimately paid only what the Commission allows. See 72 Fed. Reg. at 73,052 (limiting Board members' raises to 3.3%). While "emoluments" bear on whether someone is an officer, see *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868), this Court has never suggested they are relevant to distinguishing between principal and inferior officers.

any power to appoint its officers and employees. See 5 U.S.C. 4802(b); 15 U.S.C. 78d(b). Those factors strongly support the conclusion that the Commission is a Department for purposes of the Appointments Clause.

Petitioners contend (Br. 59) that "Departments" cannot include independent agencies because "the Appointments Clause's clear purpose was to lodge appointive power only in those 'directly answerable' to the President." But this Court has held that inferior officers can be appointed by entities that are not directly answerable to the President and do not share his political accountability. See *Freytag*, 501 U.S. at 888-892 (upholding appointments by the Tax Court); *Morrison*, 487 U.S. at 676-677 (discussing appointment of executive officers by courts). Moreover, petitioners' contention, if accepted, would rob the Commission of authority to appoint not only members of the PCAOB, but *any* inferior officers within the SEC. It would be "a most implausible disposition" to create a system in which any inferior officers within non-Cabinet (including independent) agencies could not be appointed by their immediate superiors, but must instead "be appointed by the President, the courts of law, or the 'Secretary of Something Else.'" *Freytag*, 501 U.S. at 919-920 (Scalia, J., concurring in part and concurring in the judgment). That implausible system would reverse decades of established practice at the SEC and many other non-Cabinet agencies—even though petitioners do not challenge the constitutionality of those agencies (Br. 22).

Nor does *Freytag*, on which petitioners rely (Br. 58-59), say anything to the contrary. The *Freytag* majority expressly reserved the question whether the heads of "principal agencies, such as * * * the Securities and Exchange Commission," may appoint inferior officers.

501 U.S. at 887 n.4. And Justice Scalia, in an opinion joined by three other Justices, concluded that the "evident meaning" of the term "Departments" encompassed "all agencies immediately below the President in the organizational structure of the Executive Branch," including "all independent executive establishments." *Id.* at 918-919 (concurring in part and concurring in the judgment); see also *id.* at 920 (the Founders "chose the word 'Departmen[t]' * * * not to connote size or function * * * but separate organization—a connotation that still endures even in colloquial usage today"); *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 151-153 (1996).

2. Petitioners are on no firmer ground in arguing that, even assuming the SEC can be a Department, the Chairman, not the Commissioners, should be considered its "Head." Br. 60-62. That claim was appropriately rejected by both the majority and the dissent in the court of appeals. See Pet. App. 23a-25a; *id.* at 97a n.24 (Kavanaugh, J., dissenting).

The Commission comprises five individuals appointed by the President by and with the advice and consent of the Senate. 15 U.S.C. 78d(a). As a body, the Commissioners exercise the same kind of final authority that is vested in the single "Head" of a traditional Cabinet department, and the statutory provisions granting rulemaking, investigative, and adjudicative authority uniformly vest that authority in "the Commission," rather than its Chairman.[12] So too it is "the Commission" that

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[12] See, *e.g.*, 15 U.S.C. 77s(a) (vesting rulemaking powers under the Securities Act of 1933 in "[t]he Commission"); 15 U.S.C. 77t(a) (same for investigative powers); 15 U.S.C. 78u(a)(1) (vesting authority to investigate violations of the Exchange Act in "[t]he Commission"); 15

is vested with control over the Board. 15 U.S.C. 7217. Treating the Commissioners as the SEC's "Head" therefore is much more natural than saying that the SEC has no "Head," or that its "Head" is a person in whom Congress has *not* vested the agency's final decisionmaking authority. See *Silver* v. *Postal Serv.*, 951 F.2d 1033, 1038 (9th Cir. 1991) (holding that the Postal Service is a "Department" under the Appointments Clause, and its nine Governors collectively constitute the "Head" for appointment purposes); *Authority of Civil Serv. Comm'n to Appoint a Chief Examiner*, 37 Op. Att'y Gen. 227, 231 (1933) (opining that the three commissioners of the Civil Service Commission collectively served as "the 'head of a Department' in the constitutional sense"); cf. Classification Act of 1923, ch. 265, § 2, 42 Stat. 1488 ("'the head of the department' means the officer *or group of officers* in the department who are not subordinate or responsible to any other officer of the department") (emphasis added).[13]

U.S.C. 78w(a)(1) (vesting "power to make such rules and regulations as may be necessary or appropriate to implement the provisions of" the Exchange Act in "[t]he Commission" and other agencies).

[13] The Appointments Clause itself refers to "Heads of Departments," without requiring them to be single individuals. It also expressly contemplates that collective bodies may appoint inferior officers, by allowing appointments to be made by "Courts of Law." The Judiciary Act of 1789 provided for the appointment of the Clerk of the Supreme Court by "the Supreme Court," which had six Members. See ch. 40, §§ 1, 7, 1 Stat. 73, 76; see also 28 U.S.C. 671-672 ("Supreme Court" appoints the Clerk and Marshal); 28 U.S.C. 631(a) ("judges of each United States district court" appoint magistrate judges); 28 U.S.C. 152(a)(1) (court of appeals appoints bankruptcy judges); 28 U.S.C. 751(a) ("[e]ach district court" appoints a clerk); 28 U.S.C. 49 (independent counsels appointed by three-judge division of D.C. Circuit).

Petitioners support their contrary view by noting appointments made by the Chairman pursuant to Reorganization Plan No. 10 of 1950 § 1(a), 5 U.S.C. App. at 568. Petitioners assert (Br. 62) that such appointments would be invalid if the Commissioners collectively constituted the "Head" of the SEC.

But well-settled caselaw regarding the Appointments Clause demonstrates the flaw in petitioners' claim. Even assuming that the persons identified by petitioners as appointed by the Chairman are "officers" rather than employees, this Court has long construed the Appointments Clause to permit a person other than the agency head to appoint an inferior officer so long as the appointment is made with the approval or approbation of the agency head. Thus, in *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1868), the Court concluded that the Assistant Treasurer (who was not the head of the department) could appoint an inferior officer when the appointment was made "with the approbation" of the Secretary of the Treasury. *Id.* at 392, 393-394; see *United States* v. *Smith*, 124 U.S. 525, 532-533 (1888) (emphasizing that the Secretary's approval in *Hartwell* "rendered [the] appointment one by the head of the department within the constitutional provision upon the subject of the appointing power"); *Germaine*, 99 U.S. at 511.

Consistent with that practice, Reorganization Plan No. 10 of 1950, while giving the Chairman power to appoint SEC personnel, also provided that "[t]he appointment by the Chairman of the heads of major administrative units under the Commission shall be subject to the approval of the Commission." § 1(b)(2), 5 U.S.C. App. at 568. The provisions pertaining to other agencies cited by petitioners (Br. 62) generally contain similar require-

ments. See 7 U.S.C. 2(a)(6)(A) and (C) (CFTC); Reorganization Plan No. 8 of 1950, § 1(b)(2), 5 U.S.C. App. at 567 (FTC); Reorganization Plan No. 1 of 1980, § 1(b)(1) and (2), 5 U.S.C. App. at 682 (NRC); but cf. 46 U.S.C. 301(c) (requiring Federal Maritime Commission Chairman to "consult[] with the other Commissioners").[14]

III. CONGRESS DID NOT VIOLATE SEPARATION-OF-POWERS PRINCIPLES BY CREATING THE BOARD

Petitioners contend that—even if the Board's members are inferior officers whose appointment by the Commission is proper—the Board still violates the Constitution's separation of powers. In petitioners' view, the President lacks adequate control over the Board's exercise of Executive power, either because he cannot directly remove Board members even for cause or because the Commission cannot remove them at will. But petitioners' arguments are misplaced, because the President has constitutionally adequate control over the SEC, and Sarbanes-Oxley provides the SEC, as demonstrated above, with plenary control over the Board's actions.

A. The constitutional sufficiency of the President's control over "independent" agencies has been settled for more than seventy years. *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935); see also *Wiener* v. *United States*, 357 U.S. 349 (1958). Petitioners do not dispute the constitutionality of independent agencies or

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[14] If this Court were to accept petitioners' argument that the Chairman should be deemed the "Head" of the SEC, that designation would not render the statute unconstitutional. Canons of constitutional avoidance would then dictate that the statutory grant of appointment authority to "the Commission" be deemed a grant to its "Head," the Chairman. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

of the SEC. See Br. 22. Notwithstanding the common understanding that "the President may remove [an SEC] commissioner only for 'inefficiency, neglect of duty or malfeasance in office,'" *SEC* v. *Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988), cert. denied, 489 U.S. 1033 (1989)); see also *Freytag*, 501 U.S. at 916 (Scalia, J., concurring in part and concurring in the judgment) (referring to SEC as an "independent regulatory agenc[y]"),[15] petitioners treat the constitutionality of the Commission's ability to enforce the securities laws (and Sarbanes-Oxley) as uncontroverted.[16]

Petitioners thus appear to concede (Br. 43) that the constitutional defects they perceive in the Board's structure "could be solved by * * * vesting the Board's power in the SEC." They do not, however, explain why Congress's decision to create the Board as a separate entity empowered to take steps in the first instance, but all the while subject to comprehensive SEC control, raises distinctions of constitutional significance.

B. 1. Petitioners first argue (Br. 25-28) that the Act violates the Constitution by depriving the President of the authority to remove Board members. It is, of

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[15] This understanding exists even though the provision of the Exchange Act establishing the Commission (15 U.S.C. 78d(a)) does not expressly limit the President's power of removal.

[16] Some of petitioners' amici argue that *Humphrey's Executor* should be overruled (Mountain States Legal Found. Br. 28-33), or that it has been superseded by *Morrison*, which itself should be overruled (Law Profs. Christopher Yoo et al. Br. 18, 22-24). Petitioners do not contend that the Court should overrule *Humphrey's Executor*, and neither does the United States. In the seven decades since that decision, "independent" agencies have become an accepted part of American government. Cf. *Freytag*, 501 U.S. at 921 (Scalia, J., concurring in part and concurring in the judgment) (declining to "adjust[] the remainder of the Constitution to compensate for *Humphrey's Executor*").

course, settled that the President must have the power to remove the heads of departments in the Executive Branch. *E.g.*, *Myers*, 272 U.S. at 134. But this Court has never held that the President must have direct removal authority over *inferior* officers. Pet. App. 17a-18a; see U.S. Const. Art. II, § 2, cl. 2. To the contrary, in discussing the removal of district court clerks in *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839), the Court reasoned that the power to remove an inferior officer who was not appointed by the President resided solely with the appointing authority: "the President has certainly no power to remove." *Id.* at 260. And the Court has repeatedly recognized that the power to remove an inferior officer need not be held by the President when Congress has lawfully vested the appointment of that officer in another official. See, *e.g.*, *Morrison*, 487 U.S. at 689 n.27; *Myers*, 272 U.S. at 161-164; *Perkins*, 116 U.S. at 485. Thus the Judge Advocate General, not the President, had the power of removal in *Edmond*, and the Attorney General, not the President, had the power of removal in *Morrison*.

Petitioners rely (Br. 27) on the so-called "Decision of 1789," in which Congress recognized the President's inherent authority to remove the Secretary of Foreign Affairs. The Decision of 1789, however, concerned a principal officer, not an inferior officer. This Court declined to extend the apparent rationale of the Decision of 1789 to the removal of inferior officers in *Ex parte Hennen*, explaining that the congressional debate "related * * * to the power of the President to remove officers *appointed with the concurrence of the Senate:* and the great question was, whether the removal was to be by the President alone, or with the concurrence of the Senate, both constituting the appointing power." 38

U.S. (13 Pet.) at 259 (emphasis added). Nothing in the Decision of 1789 suggests that the President must have authority to remove *inferior* officers whom he has not appointed. See *id.* at 259-260.

Petitioners' removal-power claim thus turns largely on their premise that Board members exercise power akin to that of SEC Commissioners, who are principal officers. But for all the reasons previously given, that premise is mistaken. The SEC, not the Board, is the "Department" of the Executive Branch charged with enforcing the securities laws, and Congress did not violate the Constitution by vesting the SEC, rather than the President, with the power to appoint its inferior officers, including the Board's members. It follows that Congress did not violate the Constitution by vesting the SEC, rather than the President, with the power to remove those inferior officers.

2. Petitioners also find it problematic (Br. 30) that the Commission lacks at-will removal authority and may remove a Board member only for good cause, 15 U.S.C. 7211(e)(6), 7217(d)(3). That objection fails on several grounds.

a. This Court has repeatedly held that the Constitution permits reasonable restrictions on the removal of inferior officers whose appointment Congress has vested in the Courts of Law or the Heads of Departments. As the Court observed in *Morrison*, 487 U.S. at 691, with respect to an inferior officer, "we cannot say that the imposition of a 'good cause' standard for removal by itself unduly trammels on executive authority." See also *id.* at 696 (noting that "the power to remove the counsel for 'good cause' * * * provides the Executive with substantial ability to ensure that the laws are 'faithfully executed'"). In *Myers*, the Court distinguished restrictions

placed on the removal of principal officers from those limiting the power to remove inferior officers not appointed by the President, and explicitly approved the latter. See 272 U.S. at 161 ("Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal."); see also *Perkins*, 116 U.S. at 485 (when Congress "vests the appointment of inferior officers in the heads of Departments," it may "limit and restrict the power of removal").

Petitioners do not directly challenge the holdings of those cases that Congress has the power to provide that inferior officers within an Executive agency may be removed only for cause. What petitioners appear to find objectionable (Br. 25 & n.3) is the application of these principles in the context of the SEC. According to petitioners, limitations on the Commission's power to remove Board members are rendered constitutionally problematic because coupled with limitations on the President's power to remove the Commissioners themselves. Presumably, the idea here is that the presence of two layers of "good cause" protection too far removes the actions of the Board from the possibility of presidential control. But this objection, even if potentially persuasive in some contexts, has no force with respect to the specific arrangement that Congress established in Sarbanes-Oxley, which combines constitutionally sufficient presidential control over the SEC with extraordinary control by the SEC over the Board.

Petitioners' arguments cannot succeed if the President has fully effective control, through the SEC, over the Board's activities. As the Court emphasized in *Morrison*, the animating concern of the Court's removal-

power cases is the President's ability to perform his constitutional duties: "The analysis contained in [the Court's] removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." 487 U.S. at 689-690 (footnote omitted). The "real question" in a removal challenge, the Court explained, is "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light." *Id.* at 691.

The question, therefore, is not whether two for-cause-removal provisions in the chain of Executive authority are always permissible (surely, they might not be), but only whether they are permissible in the particular context of Sarbanes-Oxley. For while removal is a "powerful tool for control," *Edmond*, 520 U.S. at 664, it is not the only one—and for purposes of assessing the constitutionality of this statute, the critical question is whether the Act, *in toto*, provides the SEC with the ability to control the Board's activities. If the SEC indeed has such control, then the constitutional validity of the President's relationship with the SEC carries over to the Board as well.

In assessing this matter, the numerous mechanisms the SEC possesses to supervise and control the Board must carry great weight. Those mechanisms include the power to review and reject all actions of the Board affecting private parties that have the force of law (rules, requests for subpoenas, and disciplinary orders) before

those actions become effective; to override the Board's non-enforcement decisions by exercising enforcement authority itself; to amend the rules governing the Board's inspections, investigations, and sanctions by imposing more detailed requirements, including prior SEC approval; and to relieve the Board of any of its responsibilities if the Commission concludes that doing so is consistent with the public interest, protection of investors, and other purposes of the Act. The Commission can exercise all those statutory powers to supplant Board decisionmaking on any basis consistent with its own statutory mission, without any need to show "good cause." Cf. Pet. App. 35a (Commission in effect has "at-will removal power over Board functions"). And the Commission also controls the Board's budget, including its members' salaries. As previously argued, the full panoply of these statutory provisions, with or without an at-will-removal provision, gives the SEC comprehensive and fully effective control over all the Board's activities.

Under *Humphrey's Executor*, *supra*, for-cause limitations on the President's power to remove Commissioners adequately preserve his ability to take care that the laws within the Commission's purview be faithfully executed. Under one of those laws, Sarbanes-Oxley, the Commission in turn can control the Board's actions by withdrawing, preempting, or supplanting any aspect of the Board's substantive authority at any time to effectuate the Commission's own understanding of the public interest and the needs of the investing public. A good-cause restriction on the Commission's authority to remove individual Board members therefore does not unconstitutionally impede the President's ability, through the Commission, to take care that Sarbanes-Oxley is

faithfully executed.[17] See Pet. App. 39a ("Given the constitutionality of independent agencies and the Commission's comprehensive control over the Board, [petitioners] cannot show that the statutory scheme so restricts the President's control over the Board as to violate separation of powers.").

Contrary to petitioners' contentions (Br. 38-43), the Court's reasoning in *Morrison* underscores the constitutionality of the Board under this analysis. First, just as the Attorney General had the power to remove an independent counsel for good cause (487 U.S. at 663), the SEC has the power to remove the members of the PCAOB for "good cause shown" (15 U.S.C. 7211(e)(6)). Second, while the Attorney General could only *request* that the Special Division appoint an independent counsel, and lacked the authority to choose the particular person for the office (487 U.S. at 661), the SEC itself selects and appoints the Board's members (15 U.S.C. 7211(e)(4)), thereby giving the Commission an important form of *ex ante* control over the Board. Third, while the independent counsel was *generally* required to abide by Justice Department policy (487 U.S. at 662, 696), the PCAOB must abide by the rules, regulations, and orders of the SEC without exception, and the Commission can directly amend or repudiate the Board's rules as it pleases. Fourth, while an investigation by the independent counsel required "the Attorney General and the Justice Department * * * to suspend all investigations and proceedings regarding the [same] matter" (*id.* at

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[17] Petitioners suggest that the affront they perceive to Executive control is made still greater by "[p]rocedural safeguards" associated with the removal of a Board member (Br. 53), but in *Morrison* this Court saw "no constitutional problem" in providing for judicial review of a decision to remove an independent counsel, 487 U.S. at 693 n.33.

662-663), the PCAOB is required to coordinate its investigations "as necessary to protect an ongoing Commission investigation" (15 U.S.C. 7215(b)(4)(A)). Finally, unlike the Attorney General, who had no authority to rescind the jurisdiction of the independent counsel once appointed, the Commission has broad authority to rescind any aspect of the Board's authority at any time, as well as to reject its rules, disciplinary orders, and requests for subpoenas, and to control its litigation.

b. Even looking only at the Commission's power to remove Board members as a means of control, that power is broader than petitioners suggest. Petitioners point out (Br. 30) that two of the three express specifications of grounds for removal of Board members in 15 U.S.C. 7217(d)(3) refer to actions that are taken "willfully." But significantly, one of those two provisions authorizes the Commission to remove a Board member who "has willfully violated any provision of this Act, *the rules of the Board*, or the securities laws." 15 U.S.C. 7217(d)(3)(A) (emphasis added).[18] Because no rule of the Board can go into effect until the Commission approves it and the Commission may thereafter amend any such rule, the Commission has broad authority to prescribe standards for the Board, the willful violation of which would furnish a ground for removal. And "willful" is itself "a word of many meanings, its construction often being influenced by its context." *Spies* v. *United States*, 317 U.S. 492, 497 (1943). In the securities context, the term has been interpreted broadly to mean, in effect, *volitional* behavior: even ordinary negligence, in this context, has been deemed "willful" conduct. See, *e.g.*,

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[18] The second provision authorizes removal of a Board member who "has willfully abused [his or her] authority." 15 U.S.C. 7217(d)(3)(B).

Wonsover v. *SEC*, 205 F.3d 408, 413-415 (D.C. Cir. 2000) (discussing "willfulness" in the securities context, and upholding the Commission's imposition of sanctions for "willful" conduct based on a broker's negligent failure to conduct a reasonable factual inquiry); see also Pet. App. 37a.

Furthermore, one express ground for removal in Section 7217(d)(3) contains no willfulness requirement at all: it authorizes removal of a member who, "without reasonable justification or excuse," has failed to enforce compliance with any Board rule or professional standard by any registered accounting firm or associated person. 15 U.S.C. 7217(d)(3)(C). That provision affords the Commission broad authority over individual Board members for conduct at the heart of their statutory responsibilities.[19]

Because petitioners failed to present their challenges to the Board's action through the special statutory procedure prescribed by Congress to review actions of the Board that would have the force of law, the SEC had no opportunity to address petitioners' cramped construction of its removal authority. In these circumstances, petitioners' facial constitutional challenge should be evaluated by giving the statute the broadest reading that the Commission could have adopted, rather than by

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[19] Section 7217(d)(3) also does not expressly make its three specified grounds of removal exclusive, and the Act could be construed to permit other grounds, if necessary to avoid constitutional difficulties. See *Edmond*, 520 U.S. at 658 (rejecting interpretation that would render appointment provision unconstitutional); *Bowsher*, 478 U.S. at 729 (questioning the dissent's premise that "the enumeration of certain specified causes of removal excludes the possibility of removal for other causes").

accepting petitioners' unnaturally restrictive construction.[20]

c. In sum, the Commission has ample authority to control every aspect of the Board's operations, through the combined force of its substantive control and removal authority. That authority, which is subject to the President's own constitutionally sufficient control over the SEC, as determined in *Humphrey's Executor*, preserves the President's ability to take care that the laws under which the Board plays a role will be faithfully executed.

3. Petitioners seek (Br. 19-20, 30-34) to buttress their separation-of-powers claim with the unwarranted suggestion that the Board is unusually susceptible to congressional influence. Nothing in Title I of Sarbanes-Oxley evinces an attempt by Congress to aggrandize its own power at the expense of the Executive. Cf. *Mistretta* v. *United States*, 488 U.S. 361, 382 (1989); *Morrison*, 487 U.S. at 694. Congress has not, for example, sought to appoint its own officers to execute the laws (cf. *Metropolitan Wash. Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991)),

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[20] If the Court were to conclude that a broad construction of "good cause" in Section 7211(e)(6) is impossible or insufficient to avoid a constitutional problem, then it could sever the grounds for removal in Section 7217(d)(3) or the "good cause" provision in Section 7211(e)(6). That would cleanly eliminate the "double for-cause removal statute." Pet. App. 80a (Kavanaugh, J., dissenting). The resulting augmentation of the Commission's already-considerable powers over the Board would be far more consistent with Congress's intentions than any broader invalidation of the Act. See *United States* v. *Booker*, 543 U.S. 220, 246 (2005); cf. *Bowsher*, 478 U.S. at 734-735 (using statutory fallback provision to invalidate more than removal power in light of evidence that "striking the removal provisions would lead to a statute that Congress would probably have refused to adopt").

to retain removal power for itself (cf. *Bowsher*, 478 U.S. at 726), or to assert control over the execution of the laws without acting through bicameralism and presentment (cf. *Chadha*, *supra*).

Indeed, the Board enjoys certain protections from congressional influence that many federal agencies do not. Most notably, the Board does not depend on Congress for regular approval of its budget, because that function is discharged by the Commission itself, 15 U.S.C. 7219(b). Thus, the significant influence that Congress would typically exercise through the appropriations process is instead exercised by the Commission.

Petitioners suggest that Congress has effectively given itself—or at least the Senate—a "veto power" (Br. 31) over the President's ability to remove Board members, hypothesizing a sequence (*id.* at 31-34) in which the President directs the Commission to remove a Board member; the Commission refuses to do so; the President removes the objecting Commissioners; the President's nominees to replace the Commissioners languish in the Senate; and, in the meantime, no action is taken with regard to the Board member or the Board's conduct. But petitioners' Rube Goldberg construct is no more a "veto" of the President's authority than a host of scenarios in which Congress could frustrate the President's appointments or proposals. If the Senate's power to advise and consent to replacement SEC Commissioners is a potential "veto" of the President's supervision (through the Commission) of the Board, that power is just as much a potential "veto" of the President's supervision of the Commission's own enforcement of the securities laws. Thus, that power of the Senate is simply an example of the permissible checks and balances that prevent the three Branches of government from being

"'hermetically' sealed from one another." *Chadha*, 462 U.S. at 951.

As the court of appeals concluded, "[t]he bulk of [petitioners'] challenge to the Act was fought—and lost—over seventy years ago" when *Humphrey's Executor* validated for-cause-removal restrictions for certain officers appointed by the President by and with the Senate's advice and consent. Pet. App. 39a-40a. Once the validity of the SEC is accepted, there is no basis for overturning Congress's decision to lodge certain matters relating to its expertise in an entity entirely subject to its supervision and control.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded with directions to dismiss the complaint. Alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FREE ENTERPRISE FUND AND
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Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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ARGUMENT

Petitioners' opening brief established that the Constitution "allocated powers among three independent branches" in order to "make Government accountable ... [and] secure individual liberty." *Boumediene v. Bush*, 128 S. Ct. 2229, 2246 (2008). To preserve these values, the Court has made clear that Congress may not "impede the President's ability to perform his constitutional dut[ies]" by denying him the authority to "control or supervise ... an executive official," *Morrison v. Olson*, 487 U.S. 654, 685, 691-92 (1988), especially where such encroachments are not "justified by an overriding need," *Nixon v. Adm'r*, 433 U.S. 425, 443 (1977). *See* Pet. Br. 17-24.

The Board clearly runs afoul of these foundational purposes and this precedent because the democratically accountable President concededly has no direct influence over the Board, and his ability to influence it through the SEC is just as nonexistent as his ability to "supervise" the New York Stock Exchange—the private entity regulated by the SEC on which the Board was expressly modeled.

In response, Respondents do not even attempt to argue that the Board squares with the Constitution's language and purposes or the test established in *Morrison*. Instead, they advance an analysis that necessarily authorizes a system in which Congress can deprive the President of virtually all meaningful control over the exercise of his executive power.

I. RESPONDENTS EVISCERATE THE EXECUTIVE AND APPOINTMENT POWER

Respondents' briefs myopically focus on specific legal points in a vacuum, but utterly fail to address the broader, dispositive point that their analysis necessarily provides Congress with virtual *carte blanche* to largely eliminate the President's ability to appoint or influence important executive officials.

First, the Solicitor General does not dispute that, if the Board is upheld, then *every* executive function could be transferred to entities identical to the Board that are overseen by independent agencies, thereby "reduc[ing] the President to the largely symbolic and hortatory role of appointing bipartisan independent commissioners who, in turn, would appoint independent board members who do the actual governing but could not be removed or supervised by the President." Pet. Br. 38.

The Board does briefly imply that the arrangement here might not be constitutionally acceptable for some undefined "'purely executive'" functions, Board Br. 52 (quoting *Morrison*, 487 U.S. at 690), but this purported "limitation" is meaningless (and incapable of principled judicial application). The Board's citation of *Morrison* for this limitation itself demonstrates that such an exception would be completely toothless, since *Morrison* upheld restrictions in the area of *criminal prosecution*—a core executive function. Even apart from *Morrison*, this exception is largely chimerical, because even the conduct of foreign policy and military operations are not *purely* executive, since Congress plays a

significant role in both. *See* U.S. Const. art. II, § 2; *id.* art. I, § 8; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952); *id.* at 635-38 (Jackson, J., concurring). Any "limitation" that does not prevent independent bipartisan commissions from replacing the Secretaries of State and Defense is meaningless. And even if those two Departments were "purely executive," the rest of the Cabinet—from Treasury to Labor—surely is not. In all events, *Morrison* itself expressly rejected any separation-of-powers analysis that "turn[s] on" whether the function at issue is "classified" as within the core or periphery of executive power. 487 U.S. at 689.

Second, with respect to the Appointments Clause, Respondents do not dispute either that the fully debated, central purpose of the Clause was to "limit[] the appointment power" in a single President (with Senate consent) and thereby "ensure that those who wield[] it [a]re accountable to political force and the will of the people," *Freytag v. Comm'r*, 501 U.S. 868, 884 (1991), or that the Excepting Clause was a mere "administrative convenience" that should not, properly interpreted, undermine that central purpose, *Edmond v. United States*, 520 U.S. 651, 660 (1997). *See* Pet. Br. 43-45. But Respondents would eviscerate both the unified Presidential appointment power and political accountability.

Their central argument is that "direction and supervision" of one officer's work product by another officer—even if not accompanied by the latter's authority to remove the former for policy-related reasons—is sufficient, standing alone, to render the

first officer "inferior." Board Br. 15-18, 21-23; U.S. Br. 24-29. This means that *only* Cabinet members (and independent commissioners) are principal officers who must be appointed by the President. Under this view, all deputy secretaries, and even the Solicitor General herself, would be inferior officers because they cannot take final binding action that is not subject to override by a Cabinet head. Indeed, the Board does not dispute that those important officers specifically identified in Petitioners' opening brief (at 51)—from the CIA Director to the FDA Commissioner—are inferior officers under Respondents' analysis, and the Solicitor General only "[a]ssume[s] *arguendo*" that they are principals. U.S. Br. 34.[1]

By so dramatically limiting the group of principal officers who must be appointed through the confirmation process, Respondents' analysis eviscerates the Framers' purpose of ensuring "political accountability relative to important Government assignments." *Edmond*, 520 U.S. at 663.

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[1] The Government's conclusory suggestion that these officials "generally enjoy broad discretion" (U.S. Br. 35) to make final decisions unreviewable by their superiors is plainly incorrect. *See* 10 U.S.C. §§ 153(a), 3013(b) & 5013(b) (Chairman of the Joint Chiefs and Army and Navy Secretaries all act "[s]ubject to the authority, direction, and control" of the Defense Secretary); 21 U.S.C. § 393(d)(2) (HHS Secretary exercises power "through" FDA Commissioner); 26 U.S.C. § 7801(a)(1) (Internal Revenue Commissioner exercises powers "under the supervision of the Secretary of the Treasury"); 49 U.S.C. § 106(f)(3)(B)(i) (requiring Transportation Secretary approval for significant regulations promulgated by FAA Administrator); 50 U.S.C. § 403-4a(b) (CIA Director "report[s] to" Director of National Intelligence).

Indeed, Respondents' position represents an exponentially greater intrusion on Presidential appointment power than simply requiring that those who counsel him on appointments adhere to the Federal Advisory Committee Act, yet every Justice to reach that issue agreed that such a mild, indirect intrusion "plain[ly]" violated the Appointments Clause. *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 482 (1989) (Kennedy, J., concurring in the judgment).

Worse still, under Respondents' interpretation of the Excepting Clause, since Congress could deny the President the power to *appoint* all such sub-Cabinet "inferior" officers, it has the correlative ability to deny the President the power to *remove* those important officers. This is because, according to Respondents, "the power of removal [i]s incident to the power of appointment," so that when Congress properly vests the appointment of inferior officers in a department head, the President literally has "*no power to remove*" and therefore Congress "may *limit and restrict the power of removal as it deems best for the public interest.*" Board Br. 36-38 (internal quotation marks omitted); *see also* U.S. Br. 44.

Accordingly, with respect to every officer whose work product may be reviewed or supplanted by another executive official, Congress could grant all such officers fifteen-year terms (analogous to Federal Reserve Governors, 12 U.S.C. § 241) immune from Presidential removal, if it thought that best served the "public interest." Thus, if a new President is elected on a platform of "change," the only personnel

he could change would be the relatively few department heads, but the actual business of those departments would still be done by the deputies on down—the very officers whose wrong-headed policies led the people to clamor for "change."

Even worse, Congress could transfer the President's appointment power to *independent agencies* like the SEC—which concededly make appointments free from all Presidential influence—because these agencies are purportedly "Departments" under the Clause. Board Br. 30-33; U.S. Br. 37-39. Thus, the President (and his alter egos) could not even fill the rare *vacancies* occurring below the department-head level.

Thus, in Respondents' hands, the Excepting Clause—a last-minute "administrative convenience," *Edmond*, 520 U.S. at 660—becomes an all-powerful vehicle for Congress to destroy the central purpose of both the Appointments Clause and separated powers, by authorizing congressional creation of a group of quasi-permanent, high-level policy officers below Cabinet-rank who are appointed by a diffuse group of individuals over whom the President exercises no political oversight. Moreover, since the continued employment of such officers would depend entirely on whether Congress shortens their offices' tenure and be unaffected by the President's wishes, those officers would have every incentive to comply with congressional desires.

In sum, simply stating the inexorable result of Respondents' "analysis" demonstrates that it is irreconcilable with any reasonable conception of the

executive and appointment power, or with *Morrison*'s prohibition against unduly hampering the President's performance of his constitutional duties.

II. RESPONDENTS' SEPARATION-OF-POWERS ARGUMENTS LACK MERIT

1. Even apart from its absurd consequences, Respondents' position is based on a flawed syllogism. Respondents insist that, although the President has no direct control over Board personnel or policies, the SEC's purportedly comprehensive control over the Board necessarily cures any deprivation of executive power because the President has constitutionally adequate control over the SEC and, *ipso facto*, has adequate control over those entities directly regulated by the SEC. This is obviously untrue. The *SEC's* control over the Board is constitutionally irrelevant because it does not possess the "executive power"; the President is "'[t]he magistrate in whom the whole executive power resides.'" *Medellin v. Texas*, 128 S. Ct. 1346, 1370 (2008) (quoting *The Federalist No. 47*, at 326 (Madison) (Jacob E. Cooke ed., 1961) (alteration in *Medellin*)). And it is clear that the President cannot sufficiently control how the Board performs its executive functions by virtue of his influence over the SEC.

Respondents do not dispute that the President's indirect control over the SEC cannot be translated into any influence over whom the SEC appoints to the Board, and the United States does not dispute that the President has no influence over the SEC's discretionary decisions to usurp the Board's functions, overturn Board sanctions or rules, or

remove Board members.[2] Thus, the President's constitutionally adequate control over the SEC cannot be translated into constitutionally adequate influence over the Board.

In contrast, vesting appointment and removal power in alter-ego *cabinet officers* does not burden the President because "their acts are his acts." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803); *see also* Pet. Br. 25 n.3. Thus, the President can easily perform his constitutionally assigned

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[2] The Board now contends that the President has the power to remove Commissioners if they "neglect" their "duty" to overturn Board actions or rescind the Board's powers. Board Br. 51. Understandably, the Board fails to explain how, short of some malfeasance like embezzlement, Board rules or sanctions could so completely violate the Board's extraordinarily open-ended requirement to act "in the public interest" that the SEC would have not only the authority, but the "duty," to reverse or rescind the Board's activities upon pain of removal by the President. *See* Pet. Br. 39-40. Indeed, Respondents point to no independent commissioner who has ever been removed on remotely comparable grounds. *See* Marshall Breger & Gary Edles, *Established by Practice*, 52 Admin. L. Rev. 1111, 1144-51 & nn.197-98 (2000), *cited in* Board Br. 31. Critically, the Board does *not* contend that the President can remove SEC Commissioners because he profoundly disagrees with what he views as fundamentally misguided policies, so long as the Board's policies are not *irrational* under the *SEC's* conception of the "public interest." Any such contention would be contrary to *Humphrey's Executor*'s ruling that independent agencies are "independent of executive authority ... and free to exercise [their] judgment without the leave or hindrance of any other official." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625 (1935); *see also* Pet. Br. 22-23, 36.

functions by directing the inferior officers through a chain of command, just as a general's ability to control a major is not affected because his orders are conveyed through a colonel. But since, unlike with his alter egos, the President has no power to command the SEC to follow his personnel or policy preferences, he obviously cannot engage in such chain-of-command supervision of the Board through the SEC.

Respondents' effort to equate the Board with the SEC's staff is plainly wrong for similar reasons. SEC staff serve at the pleasure of the Chairman. Pet. Br. 61. And the SEC Chairman serves (as Chairman) at the pleasure of the President. Pet. Br. 60-62. Since the staff are the Chairman's "alter egos," the President has the same considerable influence over them that he has over the Chairman. Not so for Board members, who are appointed and reviewed by the Commission as a whole, and who are not removable for policy-related reasons. It is indisputable that the President cannot "control or supervise" the officers or policies of the New York Stock Exchange, notwithstanding the SEC's pervasive regulatory control over that entity. The same is true of the Board that is directly modeled after the Exchange.

In short, the fact that the SEC and its staff are constitutional hardly suggests (let alone proves) that those whom the SEC regulates are also constitutional.

Indeed, while Respondents tout SEC supervision of the Board as reflecting a laudable congressional

desire to preserve the President's executive power, this SEC supervision is, in fact, a transparent device to strip the President of that basic power while maintaining the fig leaf of Presidential influence. If Congress had *not* provided for SEC review of the Board's rules and sanctions, then there would be no basis for the argument that Board members are inferior officers. Consequently, the President would have had to appoint the Board members and therefore indisputably would have had the power to remove them, because removal would follow appointment. Board Br. 36. In contrast, interjecting the SEC as a buffer between the President and the Board provides Congress with the best of both worlds. It deprives the President of any ability to influence the Board because any such effort will be thwarted by the SEC's independence or by a Senate veto if the President seeks to override that independence. At the same time, it allows Congress to directly control the Board because the Board's existence and exorbitant salaries are dependent on legislative largesse and, if need be, to control it through the SEC, over which Congress exercises considerable influence.[3]

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[3] Respondents do not dispute the Solicitor General's prior admission that "'successful insulation of administration from the President ... will tend to enhance Congress's own authority over the insulated activities.'" Pet. Br. 20 (quoting Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2271 n.93 (2001)); *see also FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1815 (2009) (plurality) ("freedom from presidential oversight (and protection)" results in "increased subservience to congressional direction"). For example,

Even if the Court and the Framers had not repeatedly warned that Congress will continually seek to "'mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments,'" *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991) ("*MWAA*") (quoting *The Federalist No. 48*, at 334 (Madison)), only the most willfully obtuse could fail to perceive Congress' direct usurpation of executive power here, or fail to understand that the Court's endorsement of this unprecedented scheme would lead Congress to draw even more executive "'power into its impetuous vortex,'" *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 221 (1995) (quoting *The Federalist No. 48*, at 333).[4]

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congressional pressure led to the resignation of the Board's first Chairman and the SEC Chairman who selected him. *See* Stephen Labaton, *3 Inquiries Begun Into S.E.C.'s Choice of Audit Overseer*, N.Y. Times, Nov. 1, 2002, at A1.

[4] The Board erroneously contends that there are other free-standing entities run by officers not appointed by the President and that double "for cause" removal provisions are common. Board Br. 20, 43. But the cited agencies are either private entities (Federal Reserve Banks, Municipal Securities Rulemaking Board) whose members are appointed by private citizens (and thus would violate the Appointments Clause if they were public entities), entities whose chairmen are appointed by the President (National Indian Gaming Commission and Board of Veteran Appeals), or simply corporations administering "private gifts" (National Fish and Wildlife Foundation). The only offices with double "for cause" removal provisions are the Inspector General regulating the

2. Respondents also cannot reconcile their position with the Court's precedent on removal.

First, neither Respondent attempts to explain how the Act's elimination of Presidential removal power can be reconciled with *Morrison*'s central prohibition against "completely stripp[ing]" the President of that power. 487 U.S. at 692. Giving limited removal power to the SEC cannot cure the constitutional problem because the United States in no way disputes that the President is without authority to direct the independent Commission on how to exercise this purely discretionary function. The Board contends that, in some undefined extreme cases, the President may order the Commissioners to exercise a "duty" to remove Board members.[5] Even if true—and it is not, *see supra* note 2—the President would be able to accomplish removal of *Board members* over SEC opposition only through what the Solicitor General aptly describes as a "Rube

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Postal Service's mail delivery, a few ALJs performing quasi-judicial functions, and the Social Security Administration's Chief Actuary, none of whom performs an executive or investigative function directed at the citizenry.

[5] The Board cites *Bowsher v. Synar* to argue that the President's power to remove SEC Commissioners is broad (Board Br. 50-51), but *Bowsher* simply recognized that the removal statute might be broad "*as interpreted by Congress*," particularly because there was no judicial review. 478 U.S. 714, 729 (1986) (emphasis added). The President has no similar freedom here, where Congress has imposed removal restrictions on him, and where there is judicial review, *see Shurtleff v. United States*, 189 U.S. 311, 313-14 (1903).

Goldberg" scenario (U.S. Br. 53) in which the Senate must confirm replacement Commissioners willing to execute removal—thus providing Congress with an impermissible veto over the removal of executive officers. Pet. Br. 31-33; *Morrison*, 487 U.S. at 686.

Second, the Board suggests that the President could somehow influence the Board because "the President's mere *threat* of removal [of Commissioners] would suffice" to compel the SEC to remove a Board member. Board Br. 53. But, of course, the President needs the power "to *remove*," not to bluster about it. Moreover, no "threat" here could actually accomplish a Board member's removal. If an SEC Commissioner voted to remove a Board member *because of* a Presidential "threat," this self-motivated acquiescence would be invalidated as improper in the mandated hearing on the member's removal. SOX § 107(d)(3), 15 U.S.C. § 7217(d)(3). (And if the Commissioner would have removed *absent* the threat, it is not *Presidential* removal.) In any event, no Board member would take the alleged "threat" seriously, since neither the hypothetical threatener—the President—nor those threatened—the Commissioners—have suggested in their brief (or anywhere else) that the President has any such removal authority. (Even under the Board's view, the President could plausibly threaten to remove only when there is a clear "duty" to remove the Board member—*i.e.*, when the member has engaged in misconduct equivalent to an impeachable offense. *See* Pet. Br. 39-40.) And removal of a Commissioner would be utterly pointless unless the Senate agreed to confirm a replacement Commissioner willing to

remove the Board member. The President's exercise of his "executive *power*" is not satisfied by his alleged potential to bluff with a very bad hand.

Third, recognizing that the President has no realistic power to remove here, the Board seeks to overturn *Morrison* by arguing that, under *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839), and *United States v. Perkins*, 116 U.S. 483 (1886), Congress may place any limit on Presidential removal "it deems best for the public interest" if it has first stripped him of the appointment power (by vesting it in an independent agency allegedly constituting a "Department"), because the power to remove purportedly stems from the power to appoint. Board Br. 36-38 (emphasis and internal quotation marks omitted). But, as even the United States concedes, *Morrison* makes clear that the "'real question'" on the constitutional validity of congressional removal restrictions is *not* whether the President has appointed the officer in question, but "'whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty.'" U.S. Br. 47 (quoting *Morrison*, 487 U.S. at 691). That is why *Morrison* studiously analyzed whether the "good cause" standard for removing the independent counsel "unduly trammel[ed] on executive authority." 487 U.S. at 691.

If the *Morrison* Court shared the Board's understanding of *Hennen* and its progeny, it would have simply rubber-stamped the removal restriction because the independent counsel was an inferior

officer properly appointed under the Excepting Clause by an entity outside the President's control. Therefore, having properly been deprived of the appointment power, the President could be stripped of the derivative removal power. But *no* judge or Justice thought the absence of appointment power relevant to the removal question in *Morrison*, even though the independent counsel made precisely the argument the Board seeks to resurrect here. *See Morrison* Appellant's Br. 54-56, 1988 WL 1031595; *Morrison* Appellant's Reply Br. 14-15, 1988 WL 1031603; *Morrison*, 487 U.S. at 693-96; *id.* at 723-24 & n.4 (Scalia, J., dissenting); *In re Sealed Case*, 838 F.2d 476, 498 (D.C. Cir. 1988); *id.* at 530 (R.B. Ginsburg, J., dissenting).

The Board's proposed rule was universally rejected in *Morrison* because it makes no sense. Denying the President the power to appoint like-minded officers—an "important ... *ex ante* control" mechanism (U.S. Br. 49)—*decreases* his ability to influence execution of the law, so such a deprivation cannot rationally justify the *additional restriction* of denying him the removal power. *See* Laurence H. Tribe, *American Constitutional Law* § 4-8, at 684 (3d ed. 2000).[6]

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[6] Justice Story's idiosyncratic views on removal—including that Congress could "'requir[e] the consent of the Senate to [such] removals'" (*Myers v. United States*, 272 U.S. 52, 150 (1926) (quoting Story))—have been rejected by the Court. *Id.* at 161; *Morrison*, 487 U.S. at 686. Similarly, amici's reading of *Marbury* (Constitutional and Administrative Law Scholars Br. 13) was rejected by *Myers*, 272 U.S. at 140-44, and by Chief Justice Marshall himself, *id.* at 144 (quoting Marshall), and the officer in *Marbury* was a justice of the peace (exercising judicial,

As this reflects, *Hennen* and *Perkins* said nothing about whether Congress unconstitutionally interfered with the President's executive power, but involved only the procedural question whether, "[i]n the absence of all constitutional ... provision" (*Hennen*, 38 U.S. at 259), it is the President or his appointing alter ego that is the proper entity to remove. Resolution of that procedural question had no relevance to separation of powers because the alter egos in *Hennen* and *Perkins* had to do the President's bidding. And, while *Perkins*' *dicta* suggests that such *subordinate alter egos* may be subject to congressional control since they have no Article II standing, such control is impermissible if it interferes with the executive power the *President* possesses under that Article. The removal restriction in *Perkins* had no cognizable effect on the President's ability to control subordinates because it obviously authorized removal of the naval cadet for failure to follow any lawful order by his superiors. *See Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting).

Fourth, there is nothing to Respondents' notion that stripping the President of removal authority can somehow be cured by vesting the *SEC* with allegedly expansive power to review the Board's *work product*. Reviewing work product is not equivalent to (or meaningful without) the power to remove, and, in any event, it is conceded that the *President* has no

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not executive, power) in the District of Columbia (over which Congress has special exclusive jurisdiction).

power to direct the SEC how to exercise its oversight function. *See supra* pp. 7-8. Moreover, even assuming that Presidential removal may be denied if "compensated" for by other means of Presidential control, Respondents cannot dispute that *every* other "compensating" factor analyzed in *Morrison*—from appointment to the office's importance and permanence—*further demonstrates* that the Act, "taken as a whole," is an impermissible intrusion on executive power. 487 U.S. at 677, 679, 685, 691; Pet. Br. 41-43.

3. As predicted (Pet. Br. 34-35), neither Respondent even attempts to offer any legitimate purpose, much less "overriding need," *Nixon*, 433 U.S. at 443, underlying Congress' decision to not place the Board's functions in the SEC or another body whose members are appointed and removable by the President. The Government simply ignores this critical factor in the Court's analysis, and the Board provides only, in a footnote, the wholly unexplained *ipse dixit* that Congress had "legitimate and important reasons for structuring the Board the way it did." Board Br. 55 n.20. The reason that Respondents cannot *articulate* such "legitimate" purposes is because any explanation of why it was "important" to *not* make the Board a "component" of the SEC would necessarily be at war with Respondents' central thesis—that Congress actually intended for the SEC to control the Board. If, as Respondents contend, Congress thought that public policy would be fully served if SEC Commissioners exercised plenary supervisory authority over those who regulated auditors, then its decision to preclude

such SEC control over Board members, by creating extraordinarily narrow grounds for removal, would be, by definition, wholly gratuitous and unnecessary. In reality, of course, Congress affirmatively rejected placing the power to regulate auditors in the SEC because it did not want SEC Commissioners to have plenary control over those regulating auditors. Amicus Br. of Law Professors Donna Nagy et al. ("Nagy Br.") 10-13. And, as the decision below and the legislative history make clear, the reason Congress rejected such plenary control is because it wanted the Board, in the words of Senator Sarbanes himself, to "actually have more independence from political influence than the SEC would have." *Accounting Reform and Investor Protection Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. 1027 (2002); *see also id.* at 15, 44, 186, 195, 793-94 (statements, comments and testimony about the Board's "insulat[ion]" from "political pressure" and "constituent pressures" "brought to bear on the Commission"); Pet. App. 34a; Nagy Br. 10-13, 17-19.

Moreover, neither Respondent even attempts to provide a legitimate justification for the Act's unprecedented decision to strip the Chairman of her traditional authority (Pet. Br. 60-62) to appoint and remove at will all chief subordinates within the SEC.

4. Apparently recognizing that the Act's language, fairly read, does not authorize anything approaching plenary SEC control over the Board, Respondents urge the Court, under the doctrine of constitutional avoidance, to give that language any

"reasonable" interpretation that enhances SEC control. Board Br. 29. But this Court gives a statute a narrow interpretation only to *avoid* a separation-of-powers question. *See Pub. Citizen*, 491 U.S. at 466; *Edmond*, 520 U.S. at 658. Where, as here, the Court must *resolve* the separation-of-powers question, it does not interpret the statute in a manner that favors the Executive over Congress by artificially interpreting the language of the congressional enactment to enhance Presidential power. Thus, in *Morrison* and *Bowsher*, the Court interpreted the removal provisions straight up, without any shading to "avoid" constitutional difficulties. 487 U.S. at 692-93; 478 U.S. at 727-30. This simply reflects the basic principle that this Court does not take sides in contests between the two co-equal branches, either by reading the statute with an eye towards enhancing Presidential control or by invoking the normal presumption of constitutionality afforded congressional enactments. *See Morrison*, 487 U.S. at 704-05 (Scalia, J., dissenting) ("where the issue pertains to separation of powers," "[t]he playing field for the ... case ... [must be] a level one").[7]

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[7] It does not matter that two administrations have defended the Act. Board Br. 51. Separated powers protect the citizenry, not the office's current occupant, *Freytag*, 501 U.S. at 880, and "[t]he Constitution's division of power ... is violated [by an improper encroachment] ... whether or not the encroached-upon branch approves the encroachment," *New York v. United States*, 505 U.S. 144, 182 (1992). *See also INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983); *MWAA*, 501 U.S. at 276-77 (invalidating congressional interference notwithstanding Solicitor General's defense); *Chadha v. INS*, 634 F.2d 408, 422 (9th Cir. 1980) (Kennedy, J.), *aff'd*, 462 U.S. 919; Amicus Br. of William Barr et

In any event, the only meaningful statutory dispute here is whether the SEC has authority to *take over* the Board's functions, and that disagreement is irrelevant to resolving this case because the SEC has *not* exercised this alleged power and the President obviously cannot *force* it to do so. Thus, "no set of circumstances exists" in which the constitutionally compliant SEC regulates Petitioners or where the possessor of the Article II power can compel it to do so. *United States v. Salerno*, 481 U.S. 739, 745 (1987). No coherent principle would permit the exercise of government power by an unconstitutional actor because an entity outside the Branch assigned that power might transfer it to the proper constitutional actor. A statute empowering an agency's ALJs to adjudicate Article III controversies would be unconstitutional even if the statute authorized the agency to transfer cases to the proper Article III courts.[8]

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al. 32 n.16. This is particularly true here because the Solicitor General's position reverses the Executive's consistently articulated view of executive power. *See Morrison* U.S. Amicus Br., 1988 WL 1031600; *Bowsher* U.S. Br., 1986 WL 728082; Steven Calabresi & Christopher Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (2008); Amicus Br. of Law Professors Christopher Yoo et al. 15-19.

[8] Similarly, severing the restrictions on the *SEC's* removal power (Board Br. 48-49) would not cure the constitutional problem here, which is the Board's lack of accountability to the *President*. Moreover, Respondents cannot show that a severed statute would "function in a *manner* consistent with the intent of Congress," *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685

III. RESPONDENTS' APPOINTMENTS CLAUSE ARGUMENTS LACK MERIT

A. Board Members Are Principal Officers

Respondents' notion that any officer subject to "direction and supervision" is, *ipso facto*, an "inferior officer" is contrary to the observations by Madison and members of this Court, as well as the Appointments Clause's language. Pet. Br. 47-48. As noted, it would also authorize a revolutionary regime where extraordinarily powerful federal officers are appointed without any accountability by the President or Senate. *See supra* pp. 3-6.

In any event, Board members are not directed or supervised by the SEC. First, the Board was concededly modeled after private self-regulatory organizations ("SROs") like the New York Stock Exchange. Far from being directly supervised or controlled by the SEC, "'the [E]xchange[] take[s] the leadership with Government playing a *residual* role.'" *Silver v. NYSE*, 373 U.S. 341, 352 (1963) (quoting Justice Douglas) (emphasis added). More specifically, the Act's sponsors and Committee Reports repeatedly described the Board as a "*strong, independent*" entity with "*broad* authority to

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(1987), given Congress' unequivocal desire to vest the Board's power in an SRO-like entity, rather than one controlled by the SEC. Instead, striking the offensive provision from the statute would "significantly alter" the "balance that Congress had in mind," "lead[ing] to a statute that Congress would probably have refused to adopt." *Bowsher*, 478 U.S. at 734-35.

investigate," S. Rep. No. 107-205, at 2, 10 (2002) (emphasis added), and "*plenary* authority to deal with this important situation," 148 Cong. Rec. 12,116 (2002) (statement of Senator Sarbanes) (emphasis added). *See also* Nagy Br. 18. Indeed, the Board's former Chairman himself said the relationship between the Board and the SEC is "that of cousins," not "that of ... parent and child." Paul S. Atkins, *Speech by SEC Commissioner* (Sept. 21, 2006), http://www.sec.gov/news/speech/2006/spch092106psa.htm (quoting Board Chairman).

More significantly, the statute's language demonstrates that Congress made the Board independent from the SEC in numerous ways. First, it deprived the SEC of the "[m]ost important[]" means of supervision, by precluding it from removing Board members absent egregious misconduct. *Morrison*, 487 U.S. at 696; *see also* Pet. Br. 46, 53. Even if the word "willful" is interpreted to mean "volitional[ly]," as the Board argues (Board Br. 22), then a Board member must "volitionally"—*i.e.*, with knowledge that he is engaging in the prohibited conduct—violate the securities laws or abuse authority (or unreasonably fail to enforce compliance) to be removed. This is gross misconduct, and plainly does not include the failure to follow SEC policies. In contrast, the independent counsel could be removed for failing to follow Justice Department policies if it was "possible" to do so. *Morrison*, 487 U.S. at 671-72.

Moreover, notwithstanding Respondents' obfuscation, it remains undisputed that the SEC exercises *no* control over the thousands of

investigations and inspections conducted by the Board. First, the *post hoc* power to review rules and sanctions (through cumbersome notice-and-comment procedures) obviously cannot be used and has never been used to shape or direct *investigative* practices. A U.S. Attorney cannot "supervise" a prosecutor's investigative actions by reviewing rules or vetoing proposed indictments. This is why the lower courts have uniformly ruled that the SEC's control over SROs' investigative activities is not sufficiently pervasive to render those activities "state action" subject to the Constitution. Nagy Br. 28-31.

Further, the SEC's hypothetical ability to issue rules requiring Commission preclearance of all Board investigations or to otherwise take over the Board's investigative responsibilities does not constitute direction and supervision. First, the SEC has not exercised this purported power and thus there is no such "direction and supervision" taking place. Second, if the SEC ever does exercise this alleged power to usurp Board's functions, that would simply *supplant* the Board, not direct or supervise its members. The ability to narrow or withdraw an office's jurisdiction does not enable one to supervise the officer for the tasks remaining within his jurisdiction. *Cf. Morrison*, 487 U.S. at 680-83. Otherwise, *Congress* would "supervise" the Board (and the SEC and all other agencies). Moreover, the "threat" of losing some of the office's responsibilities is not remotely equivalent to the threat of losing one's *job*. If anything, the ability to have the same job with *less* responsibility might well be viewed as desirable.

In any event, the SEC lacks power to usurp the Board's functions. Respondents would have this Court believe that Congress, while consciously separating the Board from the SEC and vesting it with its own statutory responsibilities, simultaneously authorized the SEC, at its discretion, to render the Board a Potemkin village full of idle, well-paid officials, by usurping all of the Board's functions. In fact, however, the Act expressly states that the SEC may impose "limitations" on the Board's authority *only* if the SEC finds, after a hearing, that the Board has "violated" the securities laws, is "unable to comply" with those laws or, "without reasonable justification or excuse," has failed to enforce them. SOX § 107(d)(2), 15 U.S.C. § 7217(d)(2). Neither the SEC's general power to issue regulations "in furtherance of th[e] Act," *id.* § 3(a), 15 U.S.C. § 7202(a), nor its power to "relieve" the Board of duties when that is "consistent with ... the other purposes of th[e] Act," *id.* § 107(d)(1), 15 U.S.C. § 7217(d)(1), permit it to limit or take over the Board's functions absent the requisite Section 107(d)(2) findings. Any such action could not be "consistent with" or "in furtherance of" the Act because (1) it would render the specific provision governing Board "limitations" a nullity and (2) the Act "nowhere gives the SEC authority to direct and supervise Board inspections, investigations, and enforcement actions." Pet. App. 95a. Thus, just as the SEC cannot assume the Board's *taxing* power, it cannot assume its investigative power.[9] And the

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[9] Contrary to the Board's representation that its power to tax is

Act's savings clause (SOX § 3(c), 15 U.S.C. § 7202(c)) simply "preserves the SEC's pre-existing authority" (Board Br. 7); it does not give the SEC the power to exercise the Board's new authority.

B. SEC Appointment Violates the Clause Even if Board Members Are Inferior Officers

1. *Freytag* squarely held that an Appointments Clause "Department" consists only of those agencies that resemble a Cabinet department, including those whose "heads are subject to the exercise of political oversight and share the President's accountability to the people," a definition that unequivocally excludes independent agencies like the SEC. 501 U.S. at 886; *see also id.* at 907, 920-21 (Scalia, J., concurring in part and concurring in the judgment); Pet. Br. 57-58.

Respondents essentially urge the Court to overrule this precedent simply because *Freytag* states the truism that the Court was not resolving issues not before it—*i.e.*, whether its holding would extend to independent agencies not at issue there. U.S. Br. 38-39; Board Br. 30. But a proper respect for precedent requires the Court "to adhere not only to the holdings of [its] prior cases, but also to their explications of the governing rules of law." *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in judgment in part

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not unique (Board Br. 19 n.3), none of the cited agencies imposes a fee on entities that it does not regulate directly and/or to which the government does not provide a reciprocal financial benefit such as insurance or marketing efforts.

and dissenting in part). This principle particularly applies here because Justice Scalia's separate *Freytag* opinion recognized that the Court's reasoning obviously extended to the "independent regulatory agencies such as ... the Securities and Exchange Commission." 501 U.S. at 916.[10]

Finally, Respondents contend that adherence to precedent would create an "implausible system" where inferior officers at independent agencies could not be appointed by their supervisors. U.S. Br. 38. But that is true only if those inferiors are "officers," which the Board denies. Board D.C. Cir. Br. 37-38. (Moreover, *Respondents'* view of "Head" would render unconstitutional any inferior officers *currently* appointed by the Chairmen of independent agencies.) In any event, appointment of all executive officers by the President (or an alter ego), far from being implausible, would further the Appointments Clause's core purpose of political accountability and simply replicate the practice in the Executive Branch departments, where the President appoints officers well below the department-head level.

2. Respondents contend that the Chairman is not the head of the SEC because the Commission collectively exercises the SEC's *regulatory* authority. U.S. Br. 40; Board Br. 33-34. But surely the relevant

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[10] The United States also frontally assaults *Freytag* by arguing that a "Department" is any agency not "subordinated to (or contained within) another component of the Executive Branch." U.S. Br. 37. But *Freytag rejected* this test, for the Tax Court was "a free-standing, self-contained entity in the Executive Branch." 501 U.S. at 915 (Scalia, J.).

question for *Appointments* Clause purposes is who makes *appointments*, and the Chairman is delegated that authority for the very purpose of providing the accountability demanded by the Clause. Pet. Br. 60-62.

Recognizing that their position would render unconstitutional any inferior officers now appointed by agency Chairmen, Respondents contend that the agencies collectively *appoint* these officers because the Commissioners collectively can *veto* the Chairman's appointments. U.S. Br. 41-42; Board Br. 35. But as Senate confirmation hearings demonstrate, approval is fundamentally different than appointment, and results in different officers being selected. Indeed, the SEC's actual experience in selecting Board members—marred by disputes between the Chairman and the other Commissioners, *see* U.S. Gen. Accounting Office, No. GAO-03-339, *Securities and Exchange Commission: Actions Needed to Improve Public Company Accounting Oversight Board Selection Process* 9-10 (2002)—belies amici's claim (Former Chairmen Br. 34 n.19) that "[n]o meaningful distinction exists, in practice" between SEC appointment and Chairman appointment.

IV. RESPONDENTS' EXHAUSTION ARGUMENT IS UNAUTHORIZED AND FRIVOLOUS

1. The Government's exhaustion argument (U.S. Br. 15-23) is not properly before the Court because Respondents failed to cross-petition the circuit court's rejection (Pet. App. 9a-11a) of that argument. "A cross-petition is required ... when the respondent

seeks to alter the judgment below," including where it seeks to replace a merits judgment with a non-merits dismissal, *Nw. Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994); *accord Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976); *Peoria & Pekin Union Ry. Co. v. United States*, 263 U.S. 528, 531, 535-36 (1924), which is exactly what the Government seeks to do here, *see* U.S. Br. 54.

The Government cannot evade the cross-petition requirement by contending that its exhaustion argument is "jurisdictional." U.S. Br. 15, 23. In *Air Courier Conference of America v. American Postal Workers Union*, the Court rejected the Government's argument that "'congressional preclusion of judicial review is in effect jurisdictional'" and thus "cannot be waived by the parties[']" failure to petition or cross-petition, and squarely held that "whether Congress intended to allow a certain cause of action" "is not a question of jurisdiction" and thus would not be decided due to the failure to raise the issue in a petition or cross-petition. 498 U.S. 517, 522-23 & n.3 (1991); *see also Nw. Airlines*, 510 U.S. at 364-65 (same).

2. There is also no merit to the argument (U.S. Br. 16-17) that a judicial challenge to the Board's unconstitutional structure can only be made by petitioning the appellate court for review of an SEC order approving a Board rule or sanction. *First*, the cited judicial review provision of the Exchange Act is not even *available* here because it extends jurisdiction only to "person[s] aggrieved by a final

order of *the Commission* entered pursuant to *this* chapter [2B]." 15 U.S.C. § 78y(a)(1) (emphasis added). But any SEC order approving Board action would be entered pursuant to *Chapter 98* of Title 15, *see* SOX § 107(b)(2), 15 U.S.C. § 7217(b)(2), not "this chapter [2B]," and separation-of-powers challengers to the Board would be "aggrieved" by *Board* actions unrelated to the rule approved by the "Commission." *See also* Amicus Br. of Center for Individual Rights ("CIR Br.") 4-6. Moreover, the Board would not be the proper respondent, 15 U.S.C. § 78y(a), as the Government implicitly concedes, U.S. Br. 17 n.6.

Second, even if available, it is simply absurd to argue that the *exclusive* means for challenging the Board's unconstitutional structure is to manufacture a "controversy" by selecting an unobjectionable Board rule at random and petitioning the appellate court to review the SEC's approval of that rule.[11] No case anywhere has ever hinted that such a standard provision for appellate review of agency orders is the exclusive vehicle for challenging the agency's (much less another agency's) constitutionality, thus

---

[11] Petitioners could not have appealed a Board sanction because the Board's investigation of Petitioner Beckstead did not result in sanctions. U.S. Br. 8 n.5. Nor were Petitioners required to *manufacture* a reviewable sanction by purposefully "refusing to comply" with the Board (U.S. Br. 17)—thereby risking serious civil *and criminal* penalties (Pet. Br. 2-3)—because it is "not require[d], as a prerequisite" to enjoining a law, "that the plaintiff bet the farm" and "expose himself to liability" "by taking the violative action." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007); *accord Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967).

displacing a district-court suit for injunctive relief—which, contrary to the Government's contention (U.S. Br. 21-23), "has long been recognized as the proper means for preventing entities from acting unconstitutionally," even absent a statutory cause of action, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001); *accord Carlson v. Green*, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting); *Davis v. Passman*, 442 U.S. 228, 241-44 (1979); *Ex parte Young*, 209 U.S. 123, 143-45 (1908).

Finally, a statutory administrative-review mechanism is exclusive only for claims "of the type Congress intended to be reviewed within this statutory structure," but not for "collateral" claims, *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994), where the agency "lacks institutional competence to resolve the particular type of issue presented, *such as the constitutionality of a statute*," or "lack[s] authority to grant the type of relief requested," *McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992) (emphasis added). *See also McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 492 (1991); *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976); *Johnson v. Robison*, 415 U.S. 361, 373 (1974); CIR Br. 8-11.

Here, (1) the SEC lacks "institutional competence" and "authority" to opine on separation of powers or invalidate the Board; (2) the SEC's views on the constitutional issues are entitled to no deference, *McCarthy*, 503 U.S. at 147-48; and (3) both the SEC and the appellate court in a statutory-review procedure "lack authority to grant the type of relief

requested," *id.* at 148, because the court can only *invalidate* the challenged SEC *order*, 15 U.S.C § 78y(a)(3), but cannot enjoin the Board's regulatory authority. Moreover, the Commission has provided (in the briefs it joined) its construction of the Act, the *same* "opportunity" it would have had in a statutory-review case.

CONCLUSION

The Court should reverse the judgment of the court of appeals, declare the Board unconstitutional, and remand the case for further proceedings.

Respectfully submitted,

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AMICUS CURIAE BRIEF

(15)

No. 08-861

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IN THE

Supreme Court of the United States

FREE ENTERPRISE FUND and
BECKSTEAD AND WATTS, LLP,
Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT
BOARD and UNITED STATES OF AMERICA,
Respondents,

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL RIGHTS UNION AND MALLORY FACTOR IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The American Civil Rights Union (ACRU) is a non-partisan, non-profit legal/educational policy organization dedicated to defending all constitutional rights, not just those which might be politically correct or fit a particular ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; Pepperdine Law School Dean, Kenneth W. Starr; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; former Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management, J. Clayburn LaForce.

This case is of interest to the ACRU because we seek to ensure that *all* constitutional rights are fully protected, not just those that may advance a particular ideology. That includes the protections for liberty embodied in the separation of powers.

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[1] Peter Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief.

Mallory Factor was Chairman of the Free Enterprise Fund when this case was first filed, where he initiated this lawsuit, though he is no longer affiliated with the organization. He is a member of the Council on Foreign Relations (CFR), recently serving as Vice-Chair of the CFR Task Force on Terrorism Financing. He currently serves as Chairman of the Chairman of the Joint Chiefs of Staff Economic Roundtable.

All parties consented to the filing of this brief, and were timely notified.

INTRODUCTION

The doctrine of separation of powers is not an arcane constitutional technicality. It provides the foundation for the system of checks and balances that the founders carefully crafted to protect American liberties from the danger of overreaching government. It also enforces accountability of public officials in our democracy. Separation of powers, therefore, is one of the fundamental bulwarks of liberty in the American system of government.

Buried in the details of the present case is a precedent for a fundamental change in this system of government. What we have here is not only an independent agency, itself pushing the envelope on separation of powers. We have an agency, the Public Company Accounting Oversight Board, which maintains independence from its only executive oversight authority, which is itself an independent agency, the Securities and Exchange Commission. Moreover, Congress created this scheme precisely to

remove the executive functions of the Board from the control and influence of the President.

We submit that this is an impermissible policy choice for the Congress under our Constitution, not an option Congress may choose when it seems to be "in the public interest." The Constitution has already made the choice that the executive functions of our government shall be under the authority of the President. If members of Congress object to that, their only option is to amend the Constitution, not enact a statute redistributing the President's constitutional authority.

This case involves a fundamental invasion of Presidential powers by an overreaching Congress. While the example here seems to involve a relatively technical Board with limited reach, if this executive function can be so thoroughly removed from the President, then others can be as well, with no apparent limiting principle. Ultimately, the President could be reduced to a functionary, with his powers redistributed to self-controlled and self-perpetuating boards and authorities subject only to the oversight of independent agencies, themselves removed from Presidential authority. Any step in this direction undermines the fundamental protections for the liberties of the American people embodied in the doctrine of separation of powers.

STATEMENT OF THE CASE

In response to highly publicized, major corporate failures involving accounting scandals, Congress passed the Sarbanes-Oxley Act ("Sarbox")

in 2002. Included in that Act was the creation of the Public Company Accounting Oversight Board ("PCAOB"), granted "massive, unchecked power, by design," to impose and enforce comprehensive regulatory requirements on accounting firms that audit public companies. The PCAOB is composed of five members authorized to carry out its duties by majority vote.

The PCAOB is separated and insulated from Presidential power and authority in the following ways:

--The five PCAOB members are not appointed by the President, but instead are appointed by a majority vote of the Commissioners of the Securities and Exchange Commission ("SEC"). Sarbox Sect. 101(e)(4), (6), 15 U.S.C. Sect. 7211(e)(4), (6). The SEC is itself an independent agency whose activities in carrying out its responsibilities are not subject to the supervision and oversight of the President. Consequently, the President has no supervisory or oversight authority over who the SEC appoints to the PCAOB.

--The President also has no authority to remove any of the members of the PCAOB. Only the SEC can remove a PCAOB member, and then only after notice and a hearing, and a finding that the member (i) "has willfully violated" Sarbox requirements, PCAOB rules or the securities laws, (ii) "has willfully abused [his] authority," or (iii) "without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard." Sarbox Sects. 101(e)(6) &

107(d)(3), 15 USC Sects. 7211(e)(6) & 7217(d)(3). Consequently, even the SEC cannot remove PCAOB members for policy disagreements.

--The President has no supervisory or oversight authority over the activities of the PCAOB, including the establishment of regulatory requirements *whose willful violation is classified and punished as a felony criminal offense.* Sarbox Sects. 103(a)(1), 15 U.S.C. Sect. 7213(a)(1), 3(b), 15 U.S.C. Sect. 7202(b); 15 U.S.C. Sect. 78ff(a).

--The President also has no supervisory or oversight authority, or even influence, over the budget or financing of the PCAOB. The PCAOB sets its own budget, *financed by a tax it is empowered to levy itself on publicly traded companies.* Sarbox Sect. 109(b)-(d), 15 U.S.C. Sect. 7219(b)-(d).

--Even the SEC's supervisory or oversight authority over the activities of the PCAOB is limited. The SEC has no control over the targets the PCAOB chooses to investigate, or how it conducts its investigations and regular inspections. Nor can it review the results of any investigation where no sanctions are imposed. Even where sanctions are imposed, the SEC can modify or cancel them only after notice and a hearing resulting in specific statutory findings. The SEC also has no authority over the PCAOB budget or the taxes it is empowered to impose under Sarbox.

--Moreover, the SEC is required to approve any PCAOB rule or regulation "if it finds that the rule is consistent with the requirements of the Act and the securities laws, or is necessary or appropriate in the

public interest or for the protection of investors." Sarbox Sect. 107(b)(3), 15 U.S.C. Sect. 7217(b)(3). The SEC can change such a rule or regulation on policy grounds only through notice and comment rulemaking. Sarbox Sect. 107(b)(5), 15 U.S.C. Sect. 7217(b)(5); 15 U.S.C. Sect. 78s(c).

--The SEC does hold the power of nullifying or imposing limitations on the activities, functions, and operations of the PCAOB only if after notice and opportunity for a hearing, it finds specific statutorily designated wrongdoing. But the SEC cannot exercise this power either for simple policy disagreements.

--Finally, the President's power over the SEC, as an independent agency, is limited as well. While the President does appoint SEC commissioners, he can remove them only for cause, which does not include policy disagreements. Moreover, since the President has no supervisory or oversight authority over the SEC, he has no such authority over how the SEC handles the powers it does have over the PCAOB.

Petitioners Beckstead and Watts, an accounting firm subject to injury by the PCAOB, and the Free Enterprise Fund, an organization with members subject to the PCAOB's authority, brought this action seeking a declaratory judgment that the PCAOB is unconstitutional, and an injunction prohibiting the PCAOB from further operations. Pet. App. 8a, 109a-110a.

The district court granted summary judgment for respondents. Pet. App. 112a-117a. The D.C.

Circuit Court of Appeals affirmed 2-1, Judge Kavanaugh dissenting. Pet. App. 2a-111a. The full circuit voted 5-4 to deny rehearing *en banc.* Pet. App. 1a.

SUMMARY OF ARGUMENT

The Constitution's careful Separation of Powers structure is one of the fundamental bulwarks of American liberty. This is why faithfully maintaining the Constitution's Separation of Powers is so important.

Yet, under the statute at issue in this case, the President has no role or authority in either appointing or removing the five members of the PCAOB.

The President also has no supervisory or oversight authority over the day-to-day activities of the PCAOB in carrying out its functions, even though the PCAOB even has the power to establish and enforce regulatory requirements *whose willful violation is classified and punished as a felony criminal offense.*

The President also has no role or authority over the budget of the PCAOB, which is set solely by the PCAOB and financed by the power granted in Sarbox to impose, enforce, and administer a tax on publicly traded companies, a power over which the President again has no role or authority.

Even the SEC's supervisory or oversight authority over the activities of the PCAOB is limited.

But the President's power over the SEC, which is an independent agency, is sharply limited as well. In particular, since the President has no supervisory or oversight authority over the SEC, he has no such authority over how the SEC handles the powers it does have over the PCAOB.

Consequently, the President's power and authority over the PCAOB could not be more thoroughly removed. Judge Kavanaugh rightly characterized the PCAOB in his dissent below as "an independent agency appointed by and removable only for cause by another independent agency" (Pet. App. at 42a), saying also, "[T]his case is *Humphrey's Executor* squared...." (Pet. App. at 42a).

Such thorough removal of Presidential power and authority has not been previously countenanced in our system of government, and cannot be squared with the very concept of Separation of Powers.

Under the Appointments Clause, applying the test established in *Edmond v. United States,* 520 U.S. 651 (1997), the members of the PCAOB must be considered principal officers who must be appointed by the President with the advice and consent of the Senate, given their powers and their independence even from the SEC. Since PCAOB members are appointed by the SEC alone, Sarbox unconstitutionally violates the Appointments Clause as well.

Congress in this case expressly sought to test the outer limits of the Separation of Powers Doctrine, openly proclaiming the creation of a "Fifth Branch of

the Federal Government" (Pet. App. at 72) with sharply reduced Presidential control even as compared to "Fourth Branch" independent agencies. Yet, the PCAOB has been granted "massive power, unchecked by design." 148 Cong. Rec. at S6334.

This case consequently presents a dangerous precedent for Congressional authority to rewrite the Constitution and its Separation of Powers, providing for sharply reduced Presidential power and control over its own Executive Branch.

ARGUMENT

I. THE PCAOB UNCONSTITUTIONALLY VIOLATES THE SEPARATION OF POWERS DOCTRINE AND THE APPOINTMENTS CLAUSE.

A. The Separation of Powers Doctrine is a Fundamental Bulwark of American Liberties.

As the Court explained in *Buckley v. Valeo,* 424 U.S. 1, 124 (1976),

> "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787. Article I, s 1, declares: 'All legislative Powers herein granted shall be vested in a Congress of the United States.' Article II, s 1, vests the executive power 'in a

> President of the United States of America,' and Art. III, s 1, declares that 'The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'"

Article II further defines the Executive Power in stating that the President shall have the sole power and responsibility to "take care that the laws be faithfully executed."

To enable the President to carry out the Executive Power granted in Article II, Section 1, Article II, Section 2 includes the Appointments Clause, which states,

> "(The President) shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Moreover, the separation of the powers of the state into three separate branches provides the foundation for the system of checks and balances our founders also carefully crafted to protect American liberty. If the legislative branch seeks to adopt oppressive laws, the separate and independent Executive can oppose them and refuse to execute

them in an oppressive manner. The separate and independent Judiciary can also refuse to uphold and enforce them, and even strike them down.

Or a runaway Executive can be checked by restraining laws adopted by the Legislature, or by the rulings of the Judiciary. A runaway judiciary, in turn, can be checked by Congressional legislation or by future Presidential appointments.

By contrast, if all of these powers were combined in one force, then these checks and balances would be lost, and a single, oppressive impulse could invade the liberties of the American people. Consequently, the Constitution's careful Separation of Powers structure is one of the fundamental bulwarks of American liberty.

As the Court again explained in *Buckley,*

> "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other. As Madison put it in Federalist No. 51: 'This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private

> interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.'"

424 U.S. at 122-123.

Finally, with the three fundamental powers of government carefully separated, the conduct of public officials is far more transparent, and they can be far more readily held accountable for their misdeeds. Members of Congress can be held accountable for bad and oppressive laws they enact. Or the President can be held accountable for bad or oppressive execution of the laws, or, more to the point of the present case, for bad, incompetent, or oppressive appointments.

As Judge Kavanaugh wrote in dissent below,

> "The Framers of our Constitution took great care to ensure that power in our system was separated into three branches, not concentrated in the Legislative Branch; that there were checks and balances among the three branches; and that one individual would be ultimately responsible and accountable for the exercise of executive power."

Pet. App. at 46a.

This is why faithfully maintaining the Constitution's Separation of Powers is so important.

B. The Structure of the PCAOB Unconstitutionally Violates the Separation of Powers Doctrine.

As discussed above, the President has no role in appointing the five members of the PCAOB. Sarbox specifically grants that power to the five commissioners of the SEC, itself an independent agency from the Executive Branch and the President. Since the President has no supervisory or oversight authority over the activities or policies of the independent SEC, he has no supervisory or oversight authority over who the SEC appoints to the PCAOB.

The President also has no authority to remove any of the five members of the PCAOB. Again, under Sarbox, only the SEC can remove a PCAOB member, and then only for specific, statutorily defined cause, found after notice and a hearing. Consequently, even the SEC cannot remove PCAOB members for policy disagreements.

The President also has no supervisory or oversight authority over the day-to-day activities of the PCAOB in carrying out its functions. Yet, the PCAOB even has the power to establish and enforce regulatory requirements *whose willful violation is classified and punished as a felony criminal offense.*

The President also has no role or authority over the budget of the PCAOB, which is set solely by the PCAOB and financed by the power granted in Sarbox to impose, enforce, and administer a tax on

publicly traded companies, a power over which the President again has no role or authority.

Even the SEC's supervisory or oversight authority over the activities of the PCAOB is limited. The SEC has no role or authority regarding the targets the PCAOB chooses to investigate, how it conducts its investigations and regular inspections, or the results of any investigation where no sanctions are imposed. The SEC can modify or cancel sanctions or penalties imposed by the PCAOB, but only after notice and a hearing resulting in specific statutory findings. The SEC also has no authority over the PCAOB budget or the taxes it is empowered to impose under Sarbox.

The SEC does have the power to change PCAOB rules and regulations on policy grounds after notice and comment rulemaking. It can nullify or impose limitations on the activities, functions, and operations of the PCAOB, but only after notice and opportunity for a hearing, which finds specific, statutorily designated, wrongdoing, so policy grounds are not sufficient for the exercise of this power.

But the President's power over the SEC, which is an independent agency, is sharply limited as well. While the President does appoint SEC commissioners, he can remove them only for cause, which does not include policy disagreements. Moreover, since the President has no supervisory or oversight authority over the SEC, he has no such authority over how the SEC handles the powers it does have over the PCAOB.

Consequently, the President's power and authority over the PCAOB could not be more thoroughly removed, except maybe if the power of appointment and removal had been granted to the Speaker of the House. Judge Kavanaugh rightly characterized the PCAOB in his dissent below as "an independent agency appointed by and removable only for cause by another independent agency" (Pet. App. at 42a, continuing:

> "[T]his case is *Humphrey's Executor*[2] squared.... [U]nder this statute [Sarbox], the President is two levels of for cause removal away from Board [PCAOB] members, a previously unheard-of restriction on and attenuation of the President's authority over executive officers. This structure effectively eliminates any Presidential power to control the PCAOB, notwithstanding that the Board performs numerous regulatory and law enforcement functions at the core of the executive power."

Pet. App. at 42a-43a.

Kavanaugh continues,

> "By restricting the President's authority over the Board, the Act renders this Executive Branch agency unaccountable and divorced from Presidential control to a degree not

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[2] *Humprhey's Executor v. United States*, 295 U.S. 602 (1935).

> previously countenanced in our constitutional structure.

Pet. App. at 45a. Kavanaugh recognized that removing all Presidential authority and control over the PCAOB was precisely Congress's purpose and intent in Sarbox, saying, "This was not inadvertent; Members of Congress designed the PCAOB to have 'massive, unchecked power.'" Id. But under our Constitution, this is an impermissible legislative purpose, as it expressly involves invasion of the President's Executive powers by the Congress. Kavanaugh explains,

> "Our constitutional structure is premised, however, on the notion that such unaccountable power is inconsistent with individual liberty. 'The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom.'"

Id. (Quoting Justice Scalia dissenting in *Morrison v. Olson,* 487 U.S. 654, 727 (1988)). *see also Clinton v. City of New York,* 524 U.S. 417, 450 (1998)(Kennedy, J. concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

Judge Kavanaugh rightly concluded, "The PCAOB contravenes these bedrock constitutional principles, as well as long-standing Supreme Court

precedents, and it is therefore unconstitutional." Pet. App. at 46a.

C. The PCAOB Unconstitutionally Violates the Appointments Clause.

The Appointments Clause, quoted above, is essential to the President's Executive powers under the Constitution's Doctrine of Separation of Powers. As the Court explained in *Myers v. United States*, 272 U.S. 52 (1926),

> "The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates....As he is charged specifically to take care that they be faithfully executed, the reasonable implication...was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws."

Id. at 117. The Court continued,

> "Our conclusion on the merits...is that article 2 grants to the President the executive power of the government i.e. the general administrative control of those executing the laws, including the power of appointment and removal of executive officers, a conclusion confirmed by his obligation to take care that the laws be faithfully executed...."

Id at 163-164.

Under the Appointments Clause, the members of the PCAOB must be considered principal officers who must be appointed by the President with the advice and consent of the Senate. *Edmond v. United States,* 520 U.S. 651 (1997). As Judge Kavanaugh explained below,

> "They are not inferior officers because they are not 'directed and supervised' by the SEC: The PCAOB members are not removable at will by the SEC, the SEC does not have statutory authority to remove them for failure to follow substantive SEC direction or supervision; and the SEC does not have statutory authority to prevent and affirmatively command, and to manage the ongoing conduct of, Board inspections, Board investigations, and Board enforcement actions. Moreover, as the statutory text demonstrates, the very purpose of this statute was precisely to create an accounting board that would operate with some substantive independence from the SEC, not one that would be 'directed and supervised' by the SEC."

Pet. App. at 44a-45a. Judge Kavanaugh rightly concluded,

> "Because PCAOB members are principal officers under the *Edmonds* test, they must be appointed by the President with the advice and consent of the Senate. The Board members are appointed by the SEC alone;

> therefore the statute [Sarbox] violates the Appointments Clause as well."

Pet. App. at 45a.

Besides this definitive resolution of the issue, for all of the same reasons just noted above, the SEC cannot be considered the Head of a Department which includes the PCAOB, contrary to the inadequate analysis of the 2-1 majority opinion below. If the SEC were the Head of a Department including the PCAOB, the PCAOB would not have all the independence from the SEC noted by Judge Kavanaugh above.

Moreover, the "the Heads of Departments" referenced in the Appointments Clause clearly refers to senior officials of the President's executive branch, not independent agencies removed from the President's authority. As Judge Kavanaugh stated, "The Supreme Court has recognized that when the head of a department appoints inferior officers in that department, the President technically exercises his removal authority over those inferior officers through his alter ego, the department head." Pet. App. 43a. *See Myers*, 272 U.S. at 133 (referring to "alter ego" of President); *Morrison*, 487 U.S. at 692 (describing the Attorney General as the President's alter ego for removal of an inferior officer by the Attorney General); *Ex parte Hennen*, 38 U.S. 230, 259-60 (1839). But an independent agency like the SEC is transparently not the alter ego of the President. That is the whole point of an independent agency.

II. THE PCAOB ESTABLISHES A DANGEROUS PRECEDENT FOR CONGRESS TO NULLIFY THE PRESIDENT'S POWER OVER HIS OWN EXECUTIVE BRANCH.

Judge Kavanaugh was correct in stating this is "the most important separation-of-powers case regarding the President's appointment and removal powers to reach the courts in the last 20 years." Pet. App. 41a.

The Separation of Powers Doctrine at issue in this case is one of the fundamental bulwarks of American liberty, creating a basic structure of American government carefully designed to protect the people from oppression due to overreaching government, as discussed above. But in this case, Congress expressly sought to test the outer limits of this Doctrine, openly proclaiming the creation of a "Fifth Branch of the Federal Government" (Pet. App. at 72) with sharply reduced Presidential control even as compared to "Fourth Branch" independent agencies. Indeed, as discussed in detail above, the President, who is invested by our Constitution with the Executive powers of our government, has no significant control or authority over the PCAOB of any sort.

Yet, the PCAOB has been granted "massive power, unchecked by design." 148 Cong. Rec. at S6334. These powers include the authority to establish and enforce regulatory requirements whose violations are criminal felonies punishable by imprisonment. It also includes the power to set its

own budget financed by special taxes which it has the power to impose.

This case consequently presents a dangerous precedent for Congressional authority to rewrite the Constitution and its Separation of Powers, providing for sharply reduced Presidential power and control over its own Executive Branch. If the PCAOB is approved, especially under the thoroughly inadequate analysis of the 2-1 majority below, then the Congress could remove Presidential authority and control over even more important areas of government, past the independent agencies of the "Fourth Branch" to the brave new world of the "Fifth Branch," where the President is a mere figurehead with no significant role.

Once this trend is begun, there is no apparent limiting principle. Federal education programs could be removed from the President and granted to a remote Federal Board of Education. Then authority over international trade could be removed to a Federal Board of Trade. Authority over labor relations could be removed to a Federal Labor Board, insulated from the supposedly partisan pressures of Presidential power and authority. Even the prosecution of federal crimes could apparently be transferred to a new Criminal Justice Board. Or the imposition of federal taxes and the need for new federal revenues could be solved by transferring the power of taxation to a new Federal Revenue Board.

We respectfully submit that this Court cannot allow this new threatening development in our law to go forward.

CONCLUSION

For all of the foregoing reasons, we respectfully submit that this Court should reverse the court below and grant the Declaratory Judgment and Injunction requested by Petitioners.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

FREE ENTERPRISE FUND *ET AL.*
Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD *ET AL.*
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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hope that a decision by this Court will prompt Congress to restructure the PCAOB as a regulator that is more accountable and transparent.

SUMMARY OF ARGUMENT

In Title I of the Act, 15 U.S.C. §§ 7211-7219, Congress placed public company accounting under the oversight of an independent private-sector board that, while not itself "an agency or establishment of the United States Government," *id.* § 7211(b), is subject to oversight by the Securities and Exchange Commission ("Commission" or "SEC"). The statutory text creating the PCAOB further specified that: "No member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service." *Id.*

Petitioners' constitutional challenge to the PCAOB presents a statutory conundrum because the PCAOB *is* part of the Federal Government, and the Board's five members *are* federal officers, notwithstanding Congress's claim to the contrary. As this Court has held explicitly, "it is not for Congress to make the final determination of [an entity's] status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995). Respondents have conceded that, under *Lebron*, the PCAOB is a federal entity for purposes of the Constitution. *See* Petitioner's Appendix (Pet. App.) 112a. Accordingly, the court below correctly rejected the statutory text and

INTEREST OF *AMICI CURIAE* [1]

Amici are scholars at American law schools whose research and teaching focus on federal securities regulation and the governance of public corporations. *Amici* have no financial stake in the outcome of this litigation but are interested in ensuring an accurate interpretation of Title I of the Sarbanes-Oxley Act of 2002 (the "Act"), which established the Public Company Accounting Oversight Board ("Board" or "PCAOB").[2]

As law professors who have studied and written about the massive accounting and corporate governance scandals that prompted the passage of the Act, we applauded Congress's decision to establish a new independent regulator to oversee the conduct of the auditors of public companies. We have been concerned, however, that the particular design chosen by Congress accorded the PCAOB substantial discretion and autonomy without imposing constitutionally sufficient accountability. The current economic crisis in the financial markets has raised for us another concern: that Congress may use the design of the PCAOB in creating additional independent financial regulators. Ultimately, we

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person other than *amici*, counsel, and counsel's academic institution contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of this brief and copies of their letters of consent have been filed with the Clerk of the Court.

[2] A full list of *amici*, who joined this brief as individuals and not representatives of any institutions with which they are affiliated, is set forth in the Appendix to this brief.

struggled to situate the PCAOB within an organizational chart of the federal government.

The members of the three-judge panel constructed very different versions of this organizational chart. Pet. App. 3a-104a, reported at 537 F.3d 667. The panel majority depicted the PCAOB as a "specialized" and "heavily controlled component" of the SEC (Pet. App. 19a, 29a-30a), with the Board's exercise of its statutory duties "subject to check by the Commission at every significant step." Pet. App. 13a. In sharp contrast, the dissenting judge regarded the PCAOB as "an independent agency appointed by and removable for cause by another independent agency." Pet. App. 65a.

As this brief seeks to show, the panel majority's view of the PCAOB as a "heavily controlled component" of the SEC cannot be squared with the Act's statutory text or legislative history. Nor can that view be reconciled with the securities industry's self-regulatory (SRO) model on which the PCAOB was patterned.[3] Mindful of the constitutional limitations placed on congressional delegations of government power to private entities, Congress provided for SEC oversight of the PCAOB in certain well-delineated areas, including recordkeeping, rulemaking, and disciplinary actions. *See* 15 U.S.C. § 7217. But the text of the statute situates the

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[3] *See* U.S. Brief in Opp. 2-3 ("Congress patterned the Board on the so-called self-regulatory organizations (SROs), such as the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE), that have regulated the securities markets under close government supervision for more than half a century.")(citation omitted).

PCAOB outside of the SEC, not within it, *id.* § 7211(b), and the text provides the PCAOB with substantial discretion and autonomy, particularly with respect to PCAOB inspections, investigations, and enforcement determinations. Congress's decision to establish a powerful accounting industry regulator that was separate and apart from the SEC was a considered one, and the legislative history confirms that Congress focused on making the PCAOB independent. *See* 148 Cong. Rec. 12,116 (2002) (statement of Sen. Sarbanes) (stating that the board was established by "statute in order to provide an extra guarantee of its independence and its plenary authority to deal with this important situation").

To be sure, Congress could have created the PCAOB as a mere "component" of the SEC, along the lines constructed by the court of appeals. And by situating the Board as a "component" within the SEC, Congress could have ensured that the PCAOB was, as the court below found, subject to check by the SEC "at every significant step." But Congress did not do so, and this Court should not try to amend the Sarbanes-Oxley Act to enact an alternative that Congress specifically considered and rejected.

Instead, this Court should scrutinize the Board that was actually established by the legislation passed by Congress and signed by the President. That legislation created the PCAOB as a corporation whose members are appointed by the SEC for fixed terms, 15 U.S.C. § 7211(e)(4)(A), and removable only by the SEC and only "for good cause shown," *id.* § 7211(e)(6); *see also id.* § 7217(d)(3) (restricting grounds for removal for "good cause"). The PCAOB was thus designed to be an independent entity —

independent from the accounting industry it was established to regulate; independent from "partisan forces" (Pet. App. 34a), and independent from both the SEC and the President.

The PCAOB's independence from the SEC and the President may well contribute to its effectiveness as a regulator, but the particular design chosen by Congress clashes directly with constitutional principles of separation of powers and the text of the Appointments Clause. The PCAOB's design violates the doctrine of separation of powers because the President has no authority to appoint or remove any member of the PCAOB, nor does an "alter ego" of the President have such authority. By lodging the power to appoint and remove PCAOB officials in the SEC, an independent agency that is itself insulated from direct control by the President, Congress has exceeded the boundaries established by this Court in *Humphrey's Ex'r* v. *United States*, 295 U.S. 602 (1935) and *Morrison* v. *Olson*, 487 U.S. 654 (1988). The PCAOB's design violates the Appointment Clause because only "inferior" officers may be appointed by Heads of Departments, and under *Edmond* v. *United States*, 520 U.S. 651, 662 (1997), PCAOB members are not "inferior" officers. As *Edmond* made clear, an "inferior" officer must have a "superior" who directs and supervises the inferior's work. *See id.* at 662-63. Because the PCAOB establishes its own regulatory initiatives and priorities, and because PCAOB members cannot be removed by the SEC at will, the SEC's Commissioners cannot properly be viewed as the "superiors" of the PCAOB. Thus, the PCAOB's members are "principal" officers who, pursuant to the Appoint-

ments Clause, must be appointed by the President with advice and consent from the Senate.

In upholding the constitutionality of the congressionally created and governmentally appointed PCAOB, the court of appeals has opened the door for Congress to establish a multitude of additional independent regulators, answerable in only limited respects to other independent regulators. Congress's pursuit of policy through this double layer of independence is particularly worrisome, for it places elected officials in a position where they will benefit regardless of the actual outcome of those policies. Through the use of such doubly-insulated regulators, "Congress and the President can claim credit for the ingenuity that resulted in regulatory successes and they can avoid blame for the private regulator's unpopular decisions or unwise policies."[4]

This Court has provided Congress much latitude in the creation of independent regulatory agencies. But a double-decker independent regulatory entity like the PCAOB stretches the constitutional text and this Court's precedents too far. This Court should declare the PCAOB unconstitutional. Congress could then restructure the PCAOB either as a unit within the SEC with members who are SEC employees, or as an independent regulator with members appointed by the President with the advice and consent of the Senate, and removable for cause by the President.

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[4] Donna M. Nagy, *Playing Peekaboo With Constitutional Law: The PCAOB and its Public/Private Status*, 80 Notre Dame Law Rev. 975, 1065 (2005).

ARGUMENT

I. ALTHOUGH SUBJECT TO SEC OVERSIGHT AND ENFORCEMENT, THE PCAOB IS INDEPENDENT FROM THE SEC

A. Congress's Creation of the PCAOB as a Private Nonprofit Corporation Belies the Court Below's *Ex Post* Characterization of the PCAOB as a "Component" of the SEC

In establishing the PCAOB "to oversee the audit of public companies," 15 U.S.C. § 7211(a), Congress recognized that it was creating a "strange kind of entity." 148 Cong. Rec. 12,122 (2002) (statement of Sen. Gramm). As Senator Phil Gramm explained: "We want it to be private, but we want it to have governmental powers. We have tried to structure it in ways to try to accommodate this." *Id.*

There is no dispute that Congress vested the PCAOB with broad governmental powers and responsibilities. These powers and responsibilities encompass substantial rulemaking, enforcement, and adjudicative functions, and include the authority to: register accounting firms that audit public companies, 15 U.S.C. § 7212; enact rules setting standards for auditing, quality control, ethics, and independence, *id.* § 7213; inspect on a yearly basis the nation's largest accounting firms and inspect other firms at least once every three years, *id.* § 7214; investigate accounting firms and their associated persons for possible violations of PCAOB

rules or the federal securities laws, *id.* § 7215; and impose discipline for established violations through a range of sanctions including censures, temporary suspensions, permanent bars, and substantial monetary fines, *id.*

The statutory text also makes clear Congress's intention to vest these broad governmental powers in a private, nonprofit corporation. In a subsection captioned "status," Congress provided that:

> The Board shall not be an agency or establishment of the United States Government and, except as otherwise provided in this Act, shall be subject to, and have all the powers conferred upon a nonprofit corporation by, the District of Columbia Nonprofit Corporation Act. No member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service.

Id. § 7211(b). This private-sector corporation was to be headed by five members appointed by the SEC for fixed terms "after consultation with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury," with vacancies filled "in the same manner." *Id.* § 7211(e)(4). PCAOB members could be removed from office by the SEC only for "good cause shown," *id.* § 7211(e)(6). Congress further provided that the SEC "shall have oversight and enforcement over the Board, as provided in this Act," *id.* §7217(a).

This Court rebuffed a legislative attempt to do an end run around the Constitution in *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995), in which it held that Amtrak's actions were subject to constitutional constraints, notwithstanding Congress's determination that Amtrak "'will not be an agency or establishment of the United States Government.'" *Id.* at 391 (quoting 45 U.S.C. § 541). This Court rejected Congress's legerdemain because where "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of [the Constitution]." *Lebron*, 513 U.S. at 400.[5]

Given this Court's holding in *Lebron*, Congress's determination that the PCAOB is not part of the Federal Government must be rejected, at least for purposes of constitutional law. As Respondents have conceded, the PCAOB's structure must adhere

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[5] As this Court has recognized, congressionally created corporations are "not a unique, or indeed even a particularly unusual, phenomenon." *Lebron*, 513 U.S. at 386. The PCAOB, however, is unique. Never before has Congress created a "private" corporation with the sheer scope of the PCAOB's rulemaking, enforcement, and adjudicative authority. *See* Nagy, *supra* note 4, at 1026-29. Claims that the PCAOB is unexceptional because it was "patterned" on the NYSE and the NASD (now the Financial Industry Regulatory Authority ("FINRA")) are unconvincing. Neither the NYSE nor NASD/FINRA was created by Congress, and the government does not appoint the officials that head those SROs. *See infra* at 23-24

to the doctrine of separation of powers and the Appointments Clause. It does not.

The statutory text nonetheless establishes the PCAOB as a corporation outside of the SEC. As this Court recognized in *Lebron*, Congress's decision to situate an entity in the private sector "is assuredly dispositive of" that entity's status "for purposes of matters that are within Congress's control – for example, whether it is subject to statutes that impose obligations or confer powers upon Government entities, such as the Administrative Procedure Act, the Federal Advisory Committee Act, and the laws governing Government procurement." *Lebron* 513 U.S. at 392 (statutory citations omitted). Congress's decision to situate the PCAOB in the private sector should also be dispositive as to whether the PCAOB is a "component" of the SEC. The statutory text makes clear that the PCAOB stands separate and apart from the SEC and, for purposes of the Constitution, is thus an independent regulatory agency subject to oversight and enforcement by another independent regulatory agency.

B. Before Settling on the PCAOB's Design, Congress Rejected Structural Alternatives That Would Have Made the PCAOB a Component of the SEC

The court below's decision to reconstruct the PCAOB as a "component" of the SEC was particularly inappropriate because Congress specifically considered that alternative and rejected it in favor of the structure ultimately selected. Indeed, in creating

the PCAOB as an independent regulator in the private sector, Congress acted contrary to the specific advice provided by the Comptroller General of the United States.

In the Senate hearings that preceded the enactment of the Act, U.S. Comptroller General David Walker testified that there were "several alternative structures" from which Congress could choose in establishing a new regulator for the accounting industry, including the creation of:

> (1) a new unit within the SEC; (2) an independent government entity within the SEC; (3) an independent government agency outside the SEC; or (4) a nongovernmental private-sector body overseen by the SEC.[6]

Although he recognized that all four alternatives had strengths and weaknesses, the Comptroller General believed that alternatives one and four had lesser likelihoods of success. He specifically noted that "under alternatives one and four, the new body would have less direct accountability to the Congress and the public than a body with board members who are PASs [president appointed confirmed by the Senate]."[7]

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[6] *See Oversight Hearings on Accounting Reform and Investor Protection Issues Raised by Enron and Other Public Companies Before the Senate Banking, Housing, and Urban Affairs Comm.*, 107th Cong. 661 (2002) (Letter from David Walker, U.S. Comptroller Gen., to Sen. Paul Sarbanes).

[7] *Id.*

The legislative history further reveals that the House of Representatives had initially favored an alternative altogether different from the four suggested by the Comptroller General. Under the proposed "Corporate and Auditing Accountability, Responsibility, and Transparency Act" (CAARTA), H.R. 3763, 107th Cong. § 2(b) (2002), a bill sponsored by Representative Michael Oxley, Congress would have established explicit criteria for "public regulatory organizations," but Congress itself would not have created any such entity. Rather, the bill required the SEC to promulgate rules reflecting and supplementing the congressional criteria, and authorized the SEC to "recognize" entities that applied to the SEC pursuant to its rules. *Id.* § 2(a). As such, this section of the CAARTA bore a close resemblance to provisions in the Maloney Act of 1938. Pub. L. No. 75-719, 52 Stat. 1070 (1938) (codified as amended at 15 U.S.C. § 78o-3), which authorized the SEC to "recognize" national securities associations, such as the NASD. Although CAARTA passed the House by a vote of 334 to 90, 148 Cong. Rec. 5548 (2002), its "public regulatory organization" alternative was subsequently abandoned in favor of an accounting oversight board that was congressionally created.

The text of the statute leaves no doubt that Congress ultimately chose the fourth alternative outlined in the Comptroller General's Senate testimony -- the creation of "a nongovernmental private-sector entity overseen by the SEC."[8] Thus,

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[8] Both a former Chairman of the PCAOB and one of the Board's initial members have noted that concerns about competitive compensation influenced Congress's decision to situate the

in depicting the PCAOB as a "component" of the SEC to salvage its constitutionality, the court of appeals essentially turned back the clock and selected for Congress the Comptroller General's first alternative that Congress had rejected – "a unit within the SEC." Because the choice of a constitutional structure for the PCAOB is one that belongs to Congress, this Court should not affirm that error.

C. The Act's Text and Legislative History Establish that the PCAOB Operates with Substantial Discretion and Autonomy

The court of appeals erred not only in its finding that the PCAOB was a "component" of the SEC; it was also incorrect in its assessment that the Act's provision for SEC oversight and enforcement constitutes "extraordinary" direction and supervision

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PCAOB in the private sector. *See* William J. McDonough, *The Fourth Annual A.A. Sommer, Jr. Lecture on Corporate, Securities & Financial Law*, 9 Fordham J. Corp. & Fin. L. 583, 599 (2004) ("We were created as a not-for-profit corporation largely so the PCAOB could pay better than the government."); Robert H. Colson, *Maintaining Public Credibility: An Interview with Charles D. Niemeier*, CPA J., Apr. 1, 2003 at 18, 19-20 (quoting statement) ("Congress had a stroke of genius when it chose to organize the board as an independent not-for-profit organization rather than as a unit of government. The board will be able to offer a compensation structure that will attract highly qualified individuals and offer them a career path that simply is not possible for people in the government."). A finding that the PCAOB's structure is unconstitutional would not preclude Congress from once again pursuing the CAARTA's alternative of congressionally-authorized private sector regulation under SEC oversight.

(Pet. App. 7a), with the PCAOB's powers subject to "a vast degree of Commission control at every significant step." Pet. App. 36a. Both the Act's text and legislative history confirm Congress's deliberate intention to structure the PCAOB as an entity that would operate with a substantial degree of discretion and autonomy.

Several aspects of the statutory text evidence the PCAOB's structural independence from the SEC. First and foremost are the Act's provisions for appointment and removal of the PCAOB's five members. PCAOB members are appointed by the SEC for staggered five-year terms, 15 U.S.C. § 7211(e)(4), and are removable by the SEC only for "good cause shown," *id.* § 7211(e)(6). As the court of appeals recognized, the decision to place the PCAOB appointment and removal power with the SEC, rather than with the President, "reflects Congress's intention to insulate the Board from partisan forces." Pet. App. 34a. But the limitations placed on the SEC's power to remove PCAOB members provide insulation from "partisan forces" to the point of negating all democratic influence. Specifically, a PCAOB member may only be removed if the SEC finds, after notice and opportunity for a hearing, that such member has willfully violated the Act, the federal securities laws, or PCAOB rules; has willfully abused his or her authority; or, without reasonable justification or excuse, has failed to enforce any registered public accounting firm's or any associated person's compliance with any such provision or rule. 15 U.S.C. § 7217(d)(3). These same provisions limit the circumstances in which the SEC can censure PCAOB members to the same findings of malfea-

sance. *Id.* The SEC's power to remove (or even censure) a member of the PCAOB is thus highly circumscribed by the Act. Critically, the SEC cannot remove PCAOB members for disagreements on matters of policy, such as prioritizing the PCAOB's rulemaking, investigative, or enforcement efforts.

The PCAOB's substantial discretion and autonomy is furthered evidenced by the limited role assigned to the SEC in connection with Board oversight. To be sure, the Act provides for comprehensive SEC oversight in connection with the PCAOB's recordkeeping, rulemaking, and disciplinary actions. *Id.* §§ 7217(a)-(c). The Act also requires the PCAOB to notify the SEC about any pending investigations involving potential violations of the federal securities laws, so that the PCAOB and the SEC's Division of Enforcement may coordinate their work. *Id.* § 7215(b)(4)(A). Yet the Act does not require SEC notification when an investigation relates to possible violations of the PCAOB's own rules. And the Act provides no role for the SEC in all of the many steps leading up to its review of the PCAOB's final rules and disciplinary sanctions.

Although the court of appeals did not dispute the statute's failure to assign the SEC any specific role in the PCAOB's inspections, investigations, and enforcement determinations (beyond the SEC's own rulemaking and its general responsibility to review and approve all PCAOB rules), the court regarded the PCAOB's substantial discretion and autonomy in these areas as trumped by the statute's grant of authority "for the Commission to limit and to remove Board authority altogether." Pet. App. 30a. Specifically, the Act provides that the SEC, by rule, "may

relieve the Board of any responsibility to enforce compliance with any provision of [the] Act, the federal securities laws, the rules of the Board, or professional standards." 15 U.S.C. § 7217(d)(1). In addition, the Act permits the SEC, by order, to "censure or impose limitations on the activities, functions, and operations of the Board" upon a finding that the Board has either violated, or is unable to comply with, the Act, the federal securities laws, or PCAOB rules or, "without reasonable justification or excuse, has failed to enforce" compliance with such provisions. *Id.* § 7217(d)(2)(B). Thus, in the view of the court of appeals, Congress essentially granted the SEC "at-will removal power over Board functions if not Board members[.]" Pet. App. 35a. [9]

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[9] The PCAOB's design as a purportedly private board exercising governmental power sheds significant light on the following paradox raised by the court below: "why would Congress deny the Commission at-will removal authority on the one hand and then provide the Commission with the authority to abolish Board powers on the other, essentially granting at-will removal power over Board functions if not Board members?" Pet. App. 35a. The validity of the court's supposition that "Commission authority over the Board" was intended to "preserve the means of Executive control" (Pet. App. 35a), is undercut by the fact that Congress was under the mistaken impression that PCAOB members would be private sector officials. *See supra* at 7-8. In all likelihood, Congress did not consider itself obligated to preserve a means of Executive control over the PCAOB; nor did Congress consider itself restrained by the Appointments Clause. *Cf.* Walter Dellinger, *The Constitutional Separation of Powers Between the President and Congress*, 63 Law & Contemp. Probs. 513, 535 (2000) (memorandum stating that "[t]he Appointments Clause simply is not implicated when significant authority is devolved upon non-federal actors"). Congress, however, was undoubtedly aware of the constitu-

But unlike the Act's oversight provisions, which obligate the SEC to review the PCAOB's final rules and disciplinary actions, the SEC's enforcement authority over the PCAOB, including its authority to displace or limit Board functions, is merely an SEC power to sanction the PCAOB for transgressions. In fact, the very caption of that subsection of the Act terms this authority a "sanction." 15 U.S.C. § 7217(d) ("Censure of the Board; Other Sanctions"). The SEC likewise possesses specific statutory authority to sanction registered broker-dealers and investment advisers for their transgressions, *see* Exchange Act § 15(b)(4), 15 U.S.C. § 78o(b)(4); Investment Advisers Act § 209, 15 U.S.C. § 80b-9, yet it would be absurd to claim that the SEC's power to sanction broker-dealers or investment advisers begets a corresponding power to "direct and control" these registered entities, thus stripping away their independence and autonomy.

The legislative history of the Act reinforces the text's design of the PCAOB as an independent

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tional restraints placed on its delegations of governmental power to private regulators. *Cf. Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398-400 (1940) (upholding congressional delegation of power to private boards because the boards' rulemaking was subject to effective governmental oversight).

Thus, the paradoxical design of the PCAOB is better explained by a concern on the part of Congress that its delegation of vast power and discretion to a private nonprofit corporation not run afoul of the so-called private delegation doctrine. *See* 148 Cong. Rec. 12,120 (2002) (statement of Sen. Gramm) (observing that "[our proposed board] is a little more independent of the SEC; though in the end, *to meet the constitutional test*, the SEC has to have authority over it") (emphasis added).

regulatory entity free from "extraordinary" control by the SEC. The Senate Report explains that the Act "creates a strong, independent board to oversee the conduct of the auditors of public companies" S. Rep. No. 107-205, at 2 (2002), and emphasizes the Board's "plenary" rulemaking, *id.* at 8, and its "broad authority to investigate" possible violations of PCAOB rules, the Act, or the federal securities laws, *id.* at 10. The congressional record is also replete with references to the PCAOB as a "strong, independent . . . board with significant authority." *See, e.g.*, 148 Cong. Rec. 12,955 (2002) (statement of Sen. Dodd); *supra* at 4 (statement of Sen. Sarbanes). And the record reflects at least one Senator's view of the Board as an entity with "massive power, unchecked power, by design." 148 Cong. Rec. 12,119 (2002) (statement of Sen. Gramm).[10]

There is no doubt that Congress feared political interference with the PCAOB's ambitious

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[10] Respondents have suggested that Senator Gramm's candid assessment of the PCAOB should be discounted because "he opposed the bill for much of the process." Board Br. in Opp. at 11 n.1. Yet a careful study of the legislative record reveals that Senator Gramm was actually a strong proponent of a powerful, independent accounting oversight board and, together with Senator Michael Enzi, had proposed an alternative structure that would have made the board "a little more independent of the SEC," by providing for presidential appointment of the board's chairman and direct appeals of board rulemaking and disciplinary sanctions to a federal district court. *See* 148 Cong. Rec. 12,120, 12,122 (2002) (statement of Sen. Gramm). Senator Gramm went so far as to acknowledge that the "board that Senator Enzi and I set up in our bill has massive unchecked power as well. I mean, that is the nature of what we are trying to do here." *Id.* at 12,119.

mission of preventing future Enron and WorldCom-type scandals, and designed the Board accordingly. As Senator Sarbanes recounted during a hearing, several witnesses had advised Congress that "if we can structure the board well enough, it might actually have more independence from political influence than the SEC would have." *See Oversight Hearings*, *supra* note 6, at 1027. The PCAOB's double insularity enabled Congress to achieve its objective in depoliticizing the PCAOB. But that structure fatally clashes with the democratic accountability demanded by the Constitution.

II. THE PCAOB'S STRUCTURE VIOLATES THE DOCTRINE OF SEPARATION OF POWERS AND THE APPOINTMENTS CLAUSE

As the foregoing analysis reveals, in creating the PCAOB as the accounting industry's overseer, Congress wanted it all. It wanted a strong, independent, private sector regulator with governmental powers, free from partisan forces and political influence. Yet Congress was unwilling to allow the accounting industry, working with the SEC, to establish its own regulator. Nor was Congress willing to allow the private sector to select the new regulator's leadership.

Under our Constitution, Congress cannot have it all. As "the Government itself," the PCAOB is subject to constitutional checks and balances. And as currently structured, the PCAOB violates both the doctrine of separation of powers and the Appointments Clause.

A. The PCAOB is Not Subject to Constitutionally Sufficient Control by the President

Congress's unconstitutional interference with the President's executive powers is most evident in the Act's provision for five-year fixed terms with explicit limitations on the removal of PCAOB members. This Court has long recognized that Congress may create entities that exercise significant executive power, notwithstanding the fact that the officials who head those entities are insulated from presidential control by their fixed terms and limited removal. *Humphrey's Ex'r* v. *United States*, 295 U.S. 602 (1935); *Morrison* v. *Olson*, 487 U.S. 654 (1988). But the officials who head such independent entities must be removable by the President for cause, *Humphrey's Executor*, 487 U.S. at 625-26, or must be removable by an alter ego of the President for cause. *See Morrison*, 487 U.S. at 692 (stating that "because the independent counsel may be terminated for 'good cause,' the Executive, through the Attorney General, retains ample authority to assure that the counsel is completely performing his or her statutory responsibilities in a manner that comports with the provisions of the Act."). As an independent regulatory agency whose commissioners serve for fixed terms, the SEC is itself insulated from presidential control to a substantial degree, and thus does not function as an "alter ego" of the President. *See Humphrey's Executor*, 295 U.S. at 628 (independent agencies "cannot in any proper sense be characterized as an arm or an eye of the executive"). Accordingly, the statute's provision for SEC-only

removal of PCAOB members contravenes both *Humphrey's Executor* and *Morrison* and provides "no means for the President to ensure the 'faithful execution' of the laws." *Morrison*, 487 U.S. at 692.

Like the Act's provision for SEC removal of PCAOB officials, Congress's decision to lodge the appointment power in the SEC further attenuates the President's control over the PCAOB, and thus further compromises the separation of powers. The SEC's power to appoint PCAOB officials deprives the President of the ability to choose like-minded members who share his policy goals and preferences. As the current Solicitor General recognized in a 2001 article, "[a]s a practical matter, successful insulation of administration from the President even if accomplished in the name of 'independence'—will tend to enhance Congress's own authority over the insulated activity."[11] Accordingly, while the Act's provisions for the appointment and removal of PCAOB members do not constitute direct congressional aggrandizement of power, these provisions nonetheless produce that effect.

Under *Humphrey's Executor* and *Morrison*, the Constitution does not prohibit Congress from enhancing its power through the creation of independent regulatory agencies like the SEC. However, this Court should not extend those decisions to allow Congress to accumulate even more power through the creation of a regulator like the PCAOB that is two steps removed from Presidential control.

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[11] Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2271 n. 93 (2001).

B. PCAOB Members are Not Inferior Officers

The Act's provision for SEC appointment of the PCAOB's five members also contravenes the text of the Appointments Clause because the members of the PCAOB do not qualify as "inferior" officers who may be appointed by the Head of a Department. As this Court held in *Edmond* v. *United States*, 520 U.S. 651, 662 (1997), "[w]hether one is an 'inferior' officer depends on whether he has a superior" other than the President. SEC Commissioners who cannot remove PCAOB members in connection with even substantial disagreements about matters of policy can hardly qualify as the PCAOB's "superiors."

This Court has further clarified that inferior officers "are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663 (1997). Yet by channeling the SEC's oversight role toward PCAOB recordkeeping, rulemaking, and disciplinary actions, Congress ensured that the PCAOB would remain free to pursue its own policy initiatives and priorities.

Moreover, the Commission's ultimate authority "to limit and to remove Board authority altogether" (Pet. App. 30a) does not transform the SEC Commissioners into the PCAOB's supervisors. Congress possesses an analogous power "to limit and to remove [SEC] authority altogether" through amendments to the Exchange Act and the other securities laws, or by withholding appropriations.

Yet Congress's ultimate authority to limit the functions of the SEC, or to abolish the agency entirely, does not make Congress the "supervisors" of the SEC's five Commissioners. Nor does Congress's "at-will removal power over [SEC] functions" provide Congress with direction and control over the execution of the law. If it did, then the SEC, and all of the other independent regulatory agencies subject to congressional oversight and appropriation, would be unconstitutional under *Bowsher* v. *Synar*, 478 U.S. 714, 722 (1986) ("The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the law it enacts."). Accordingly, the SEC's "at-will removal power over Board functions" cannot constitute constitutionally sufficient direction and control for purposes of the Appointments Clause.

III. THE SRO MODEL ON WHICH THE PCAOB WAS PATTERNED FURTHER DEMONSTRATES THAT SEC OVERSIGHT AND ENFORCEMENT AUTHORITY IS NOT SYNONYMOUS WITH DIRECTION AND CONTROL

Congress patterned the PCAOB on the securities industry's self-regulatory model, which has been in place for more than 70 years. *See supra* note 3. Although this model has sparked unsuccessful constitutional challenges under the nondelegation doctrine,[12] the model has not triggered the other

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[12] *See, e.g., R.H. Johnson & Co.* v. *SEC*, 198 F.2d 690 (2d Cir. 1965) (concluding that Exchange Act Section 15A did not constitute an unconstitutional delegation of power to the NASD

types of constitutional challenges raised in the case at bar because SROs, like the NASD (now FINRA) and the NYSE, are not created by the government, nor are their officials appointed by the government. Accordingly, the NYSE and FINRA, unlike the PCAOB, are not part of the "Government itself" under *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995), and NYSE and FINRA officials are not federal officers or employees for purposes of the Appointments Clause.[13] The SRO model is nonetheless useful in analyzing the constitutionality of the PCAOB because, as explained below, the statutory provisions granting the SEC oversight and enforcement authority over the PCAOB are virtually

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because of the SEC's authority to disapprove NASD rules and review NASD disciplinary actions).

[13] *See* Nagy, *supra* note 4, at 1022-25 (observing that both the NYSE and the Investment Bankers Association of America (a trade group that later restructured to become the NASD) "were formed at the initiative of securities brokers and firms long before Congress enveloped them in a regulatory scheme" and emphasizing that neither the NYSE nor FINRA have a governmentally appointed board). As a governmentally created SRO, the Municipal Securities Rulemaking Board (MSRB) stands out as an exception. In 1975, Congress authorized the SEC to create the MSRB, and the SEC was charged with appointing the MSRB's initial Board. *See* Exchange Act §15B, 15 U.S.C. § 78o-4(b). However, although the PCAOB and the MSRB share a similar congressional origin, the MSRB's discretion is nowhere near as vast as the PCAOB's: the MSRB's statutory responsibilities extend only to rulemaking subject to SEC review and approval, and do not involve any investigative or enforcement authority. *Id.* Accordingly, assuming the MSRB is the Government itself under *Lebron*, its rulemaking responsibilities do not raise the same constitutional concerns as the PCAOB.

identical to the statutory provisions providing for SEC oversight and enforcement authority over the NYSE and FINRA.

The similarities between the PCAOB and the NYSE and FINRA are striking. As with the PCAOB, Congress has delegated substantial rulemaking, enforcement, and adjudicatory powers to these private self-regulators, with each SRO's recordkeeping, rulemaking, and disciplinary actions subject to SEC oversight. *See* Exchange Act §§ 17(a) and (b), 15 U.S.C. §§ 78q(a) and (b); Exchange Act §§ 19(b) and (d), 15 U.S.C. §§ 78s(b) and (d). Moreover, as with the PCAOB, the SEC has enforcement authority over the SROs. Specifically, the SEC may, by order, suspend or revoke the registration of an SRO, or "censure or impose limitations on the activities, functions, and operations" of an SRO, upon a finding that the SRO has either violated, or is unable to comply with the law or, "without reasonable justification or excuse, has failed to enforce" any member firm's or any associated person's compliance with any such provision or rule. Exchange Act, §19(h)(1), 15 U.S.C. § 78s(h)(1). The SEC may also remove any SRO officer or director for willful violations of law or abuses of authority. Exchange Act § 19(h)(4), 15 U.S.C. § 78s(h)(4). Finally, as with the PCAOB, the SEC may, by rule, "relieve" an SRO of any of its enforcement responsibilities under the Exchange Act. Exchange Act § 19(g)(2), 15 U.S.C. §78s(g)(2).[14]

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[14] To the extent that there are differences between the PCAOB and the NYSE and FINRA beyond the critical distinction of the PCAOB's governmental creation and appointment of members, these differences are principally designed to make the PCAOB

The SRO model thus provides for SEC oversight and enforcement over the private self-regulators in the securities industry, but that oversight and enforcement authority does not even come close to the type of SEC direction and supervision that would be necessary for the PCAOB's structure to comply with the doctrine of separation of powers and the Appointments Clause. As former SEC chairman, Justice William O. Douglas once explained, the SRO model in the securities industry lets "the exchanges take the leadership with Government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use, but with the hope it would never have to be used." William O. Douglas, *Democracy and Finance* 82 (James Allen ed., 1940) (cited in *Silver* v. *New York Stock Exchange*, 373 U.S. 292, 352 (1963)). Although Congress revised the statutory scheme in 1975 to provide for additional SEC oversight and enforcement authority over the SROs (as reflected in the provisions discussed above), the fundamental

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an even more powerful regulator than the SROs. These differences include: the PCAOB's guaranteed source of funding through statutorily mandated accounting support fees paid by public companies, *id.* §7219(d)(1); a means for the PCAOB to subpoena testimony and documents (from persons other than registered accounting firms and their employees) through requests to the SEC, *id.* §7215(b)(2)(D); immunity for PCAOB officials "to the same extent as an employee of the Federal Government in similar circumstances," *id.*, §7215(b)(6); and a statutory privilege from third party discovery of PCAOB materials. *Id.* §7215(b)(5).

framework recognized by Justice Douglas has remained unchanged.[15]

Title I of the Sarbanes-Oxley Act reflects a similar congressional intention to assign leadership over the accounting industry to the PCAOB, with the SEC playing the "residual role." The statutory design ensured that the PCAOB would take leadership, in particular, with respect to key executive functions involving inspections and investigations of, and the initiation of disciplinary proceedings against, auditors of public companies. The fact that the SEC can theoretically pick up a well-oiled "shotgun" sometime in the future does not make the SEC the superiors of the PCAOB for the present while that shotgun remains behind the door. As leaders acting separately and apart from the SEC, the PCAOB members are "principal officers" who must be appointed by the President with advice and consent by the Senate, and must be removable by the President for cause.

To be sure, this Court has described the SEC's "supervisory authority" over the SROs as "extensive" and "pervasive." *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 732-33 (1975). This Court, however, was considering the specific context of SRO rulemaking and the SEC's

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[15] *See* Fair Administration and Governance of Self-Regulatory Organizations, Exchange Act Release No. 50699, 69 Fed. Reg. 71,126, at 71,128 (Dec. 8, 2004) (stating that while "the Commission has ultimate responsibility for oversight of the U.S. securities markets and their participants, the SROs continue to have 'front-line' responsibility for overseeing trading on their markets and their members' compliance with applicable statutory and regulatory provisions")

statutory responsibility to review and approve an SRO's rules.

The SEC's extensive role as "reviewer" of an SRO's final rules, like its extensive role as "reviewer" of SRO disciplinary sanctions, does not alter the fact that SROs operate with substantial discretion and autonomy in all of the many steps leading up to those rules and disciplinary sanctions. Although SROs are required under the Exchange Act "to provide a fair procedure for the disciplining of members," Exchange Act § 15A(b)(8), 15 U.S.C. §78o-3(b)(8), SROs typically conduct their investigations, enforcement determinations, and adjudications free from dictates by the SEC.[16] Indeed, for purposes of constitutional protections such as the Fifth Amendment's privilege against self-incrimination, the SEC and courts have consistently refused to regard SRO action as "state action" precisely because SRO investigations and disciplinary proceedings are *not* conducted under the direction and control of the SEC.[17]

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[16] *See* Alan Lawhead, *Useful Limits to the Fifth Amendment: Examining the Benefits that Flow From A Private Regulator's Ability to Demand Answers to its Questions During an Investigation*, 2009 Colum. Bus. L. Rev. 211, 250 (stating that "[t]he initiative for typical cases is entirely FINRAs. FINRA investigates, files a complaint, and litigates the case, all without any government approval or pressure to do so.").

[17] *See id.* at 223-65 (discussing this Court's "state actions" tests and their applicability to FINRA). *But see* Roberta S. Karmel, *Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?*, 14 Stan. J.L. Bus & Fin. 151, 171-78 (2008) (observing that judicial decisions regarding SRO immunity are very difficult to reconcile with constitutional decisions concluding that SROs are not state actors).

With respect to SRO disciplinary proceedings, both the SEC and federal courts have routinely depicted the SEC's role as a limited one. As the SEC has explained,

> SRO proceedings are not initiated by a government agency, nor does their initiation require our approval. We do not participate in the disciplinary proceeding before the SRO, and we do not control when the SRO begins or concludes its determination. Our sole responsibility in this context arises when an SRO imposes a final disciplinary sanction on a person who seeks review of the SRO's determination from this Commission.[18]

Lower courts have likewise described the SEC's role in SRO disciplinary proceedings as involving "adjudication."[19]

SROs are also typically found to be acting free from the SEC's direction and control in the course of SRO investigations, including investigations for

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[18] *In the Matter of Larry Ira Klein*, Release No. 34-37835, 52 S.E.C. Docket 1030, 1039 (Oct. 17, 1996) (ruling that NASD disciplinary proceedings need not conform to 28 U.S.C. § 2462's five year statute of limitations generally applicable in government proceedings where a sanction is sought).

[19] *See, e.g., Jones* v. *SEC*, 115 F.3d 1173, 1181 (4th Cir. 1997) (holding that neither the Fifth Amendment's Double Jeopardy clause nor collateral estoppel prevented the SEC from instituting its own enforcement action, because "as reviewer" of an NASD disciplinary proceeding, "the SEC does not become a party; its review role is an adjudicatory one").

possible violations of the federal securities laws.[20] SRO investigations are thus only rarely deemed state action, and only on some of the infrequent occasions in which the SRO engages in "joint action" with the SEC or the Department of Justice.[21]

Once again, Congress cannot have it both ways: If the SRO model is one that provides for SEC oversight and enforcement, but nonetheless permits the SROs to operate with substantial discretion and autonomy, then under that model, the SROs, and by extension the PCAOB, cannot be said to be operating under the SEC's "extraordinary" direction and

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[20] *See, e.g., D.L. Cromwell Inv., Inc.* v. *NASD Regulation, Inc.*, 279 F.3d 155, 161 (2d Cir. 2002) (stating that the Fifth Amendment "will constrain a private entity only insofar as its actions are found to be 'fairly attributable' to the government" (citing *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)); *United States* v. *Solomon*, 509 F.2d 863 (2d Cir. 1975) (finding no violation of the Fifth Amendment where the government relied on testimony that was compelled in an NYSE investigation); *Shultz v. SEC*, 614 F.2d 561, 569 (7th Cir. 1980) (Chicago Board Options Exchange is "not an authority of the Government" and thus not governed by the Administrative Procedure Act).

[21] *See, e.g., In the Matter of Frank Quattrone*, Release No. 53547, 87 S.E.C. Docket 1847, 2165 (Mar. 24, 2006) (emphasizing that "cooperation between the Commission and the NASD will rarely render NASD a state actor, and the mere fact of such collaboration is generally insufficient, standing alone, to demonstrate state action," but holding that respondent "proffered enough evidence concerning the Joint Investigation to earn an evidentiary hearing"). *See generally* Lawhead, *supra* note 16, at 256-58 (citing cases and concluding that the "uniform result reached by lower federal courts and the SEC has been that FINRA, NASD, and the New York Stock Exchange are private actors").

control. If, however, the SRO model is one that provides for "a vast degree of Commission control at every significant step" (Pet. App. 36a), then SROs are essentially alter egos of the SEC, and most of their actions constitute "state action" that is subject to the Constitution and a host of federal statutes.

CONCLUSION

For these reasons, *amici* respectfully urge this Honorable Court to reverse the ruling of the United States Court of Appeals for the District of Columbia.

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APPENDIX

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AND UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTEREST OF AMICI CURIAE[1]

The Honorable William P. Bar served as Attorney General of the United States from 1991 to 1993. He also served as Assistant Attorney General for the Office of Legal Counsel from 1989 to 1990 and Deputy Attorney General from 1990 to 1991. The Honorable Edwin Meese III served as Attorney General of the United States from 1985 to 1988. He served as Counselor to President Ronald Reagan from 1981 to 1985. The Honorable Richard Thornburgh served as Attorney General of the United States from 1988 to 1991. He also served as Assistant Attorney General for the Criminal Division from 1975 to 1977 and Governor or Pennsylvania from 1979 to 1987.

As former Executive Branch officials, they have a substantial interest in this case, which involves the Constitution's allocation of executive power and thus the President's duty to "take Care that the laws be faithfully executed." U.S. Const., art. 2, § 3. The President's constitutional obligation to faithfully execute the laws requires that he hold the power to remove officials who exercise executive power. These former Attorneys General believe that preserving this structural design maintains proper lines of authority through the Executive Branch and ultimately ensures that the Executive will remain accountable to the American people.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF has devoted substantial resources to litigating constitutional and statutory cases over the last 30 years in support of the free enterprise system and in opposition to unlawful and excessive government regulation of business due to the detrimental effects such actions have on American businesses, workers, and consumers, as well as the economy as a whole. In particular, WLF has appeared as amicus curiae before this Court and lower federal courts (including the circuit and district courts in this case) in cases raising important constitutional issues—including separation of powers cases—and statutory questions.

With regard to securities law and regulation, WLF has instituted an Investor Protection Program designed to ensure that shareholders' interests are protected in the judicial and regulatory process. For example, WLF opposes abusive securities class action cases, *Dura Pharmaceuticals Inc. v. Broudo*, 544 U.S. 336 (2005), and has supported recommendations to relieve smaller public companies from the regulatory burden of Section 404 of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 ("Sarbanes-Oxley") because the prohibitive costs of compliance decrease profitability and the share value of such companies. *See* WLF Comments to SEC's Advisory Committee on Smaller Public Companies (filed Apr. 3, 2006). In addition, WLF's Legal Studies Division publishes and distributes policy papers addressing the negative effects of Sarbanes-Oxley on businesses and the economy. These are available on WLF's website, www.wlf.org.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the wake of the Enron and WorldCom accounting scandals, Congress sought to pass legislation to supervise the auditing of American public companies as a means of preventing similar incidents in the future. Congress therefore enacted the Sarbanes-Oxley Act, which created the Public Company Accounting Oversight Board ("PCAOB")—a purportedly independent private entity that is, by design, unchecked by the political branches and unresponsive and unaccountable to the public. Those speaking in favor of the Sarbanes-Oxley Act, which created the PCAOB, touted this fact as one of its virtues: "This board is going to have *massive power, unchecked power, by design*. . . . We are setting up a board with massive power that is going to make decisions that affect all accountants and everybody they work for, which directly or indirectly is every breathing person in the country. They are going to have *massive unchecked powers*." 148 Cong. Rec. S6334 (daily ed. July 8, 2002) (statement of Sen. Gramm) (emphasis added).[2]

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[2] Congress sought to create an entity that would be insulated from "the myriad of constituent pressures" of the political arena, Accounting Reform and Investor Protection hearings Before the S. Comm. on Banking, Housing, and Urban Affairs, 107th Cong. 44 (2002) (statement of former SEC Chief Accountant Michael H. Sutton), such as the "extraordinary amount of political pressure . . . brought to bear on the [SEC]" in its previous attempts to restrict the consulting work that auditors could perform. *Id.* (statement of former SEC Chairman Arthur Levitt).

In creating the PCAOB, Congress ignored the Supreme Court's warning that "[e]xtraordinary conditions do not create or enlarge constitutional power." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528 (1935); *see also Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935) ("The question is not of the intrinsic importance of the particular statute before us but of the constitutional processes of legislation which are an essential part of our system of government."). Indeed, even during a time of war, in conditions that are surely more extraordinary than a crisis of public accounting, the Supreme Court has vigorously enforced the separation of powers. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) ("The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times.").

To achieve this lack of accountability, Congress stripped the President of all removal authority over PCAOB members, making them removable only by the SEC and even then removable only for a very limited set of reasons. *See* Sarbanes-Oxley § 101(e)(6).[3] This is both illegal and unwise. It is constitutionally impermissible for the reasons stated by the Petitioners, including because the PCAOB's unique double for-cause limitation on the President's ability to remove goes beyond any previously sanctioned limits on presidential removal power, because the SEC's purported control

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[3] PCAOB members also collect salaries greater than that of the President. *See* Ian Katz, Sarbanes-Oxley Auditing Board Chairman Olson Resigns, Bloomberg.com (June 8, 2009) (salaries are currently $673,000 for the Chairman and $547,000 for each of the other members).

over the PCAOB is not a proper substitute for the President's control, and because Sarbanes-Oxley violates the Appointments Clause. *See* Brief of Petitioners, *Free Enterprise Fund v. Public Company Accounting Oversight Board* (No. 08-861) (filed July 27, 2009). Moreover, the lack of political oversight over the PCAOB has had deleterious effects: Sarbanes-Oxley's requirements have raised substantially the direct costs of public companies for accounting and auditing services;[4] the burden of compliance has kept numerous companies from going public and has even compelled increasing numbers of public companies to go private;[5] and the Act has aided the very accounting firms it sought to restrain.[6]

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[4] Cost estimates demonstrate that the SEC grossly underestimated the cost of the PCAOB. *See* American Electronics Association, Sarbanes-Oxley Section 404: The 'Section' of Unintended Consequences and Its Impact on Small Business (Feb. 2005), *available at* http://www.aeanet.org/governmentaffairs/AeASOXPaperFinal021005.asp ("The implementation cost is approximately $35 billion—more than 20 times greater than the SEC estimated in 2003.").

[5] *See* Peter J. Wallison, *Sarbanes-Oxley and the Ebbers Conviction*, Financial Services Outlook at 16, AEI Online (June 10, 2005), *available at* http://www.aei.org/publications/pubID.22648/pub_detail. asp (citing Ellen Engel, Rachel Hayes, & Xue Wang, *The Sarbanes-Oxley Act and Firms' Going-Private Decisions* (Paper, Graduate School of Business, University of Chicago, May 6, 2004)).

[6] Although Sarbanes-Oxley contains restrictions on the consulting work that can be performed by accounting firms, the Big Four accounting firms all reported double digit increases in profitability in 2004, largely because of substantial—reportedly, 78 to 134 percent—fee increases. *See* Wallison, *supra*, p.16 (arguing that Sarbanes-Oxley and the PCAOB are unnecessary and overly

(continued...)

Amici write separately to emphasize that the President's inability to remove members of the PCAOB runs directly counter to both the Framers' vision for the proper structure of government and over two centuries of historical precedent with regard to the removal power. As revealed by the debates and votes in the first Congress now known as the "Decision of 1789," those who framed the Constitution and were the closest to its enactment understood that the President was to have the power to remove, and that Congress could not devolve that power to itself or anyone else. Following that decision, the Executive Branch—through words and actions—has consistently reaffirmed this basic understanding and jealously defended the President's removal power despite continual congressional attempts to weaken it.

Protecting the President's removal power is fundamentally a question of the separation of powers. The Framers built structural protections into the Constitution in order to preserve liberty. *See* THE FEDERALIST No. 47 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny."). Chief among these structural protections was (and is) the separation of powers: "[I]f there is a principle in our Constitution, indeed in any free Constitution more sacred than another, it is that which separates the legislative, executive, and judicial powers." *Myers v.*

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[6](...continued)
burdensome and that the longstanding threat of criminal conviction was sufficient to deter fraudulent accounting practices).

United States, 272 U.S. 52, 116 (1926) (quoting 1 Annals of Congress, 581); *see also id.* ("Their union under the Confederation had not worked well, as the members of the convention knew. Montesquieu's view that the maintenance of independence, as between the legislative, the executive and the judicial branches, was a security for the people[,] had their full approval."). Because the executive power is "vested in a President of the United States of America," the President's powers must be separated from those of the legislature and the judiciary. This separation ensures that each branch is ultimately responsible to the people, and that the people know whom to hold responsible for the failings within that branch. *See Bowsher v. Synar*, 478 U.S. 714, 722 (1986); *Freytag v. Comm'r*, 501 U.S. 868, 884 (1991). Indeed, where more than one person might be said to have been responsible for a particular action, "[i]t often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." THE FEDERALIST No. 70 (Hamilton).

The power to supervise those exercising executive authority—particularly the ability to remove—is therefore one of the key powers that must remain with the President at all times. *See Myers*, 272 U.S. at 117 (stating that because the President's "selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible"); *Loving v. United States*, 517 U.S. 748, 757-58 (1996) (stating that the Constitution "allocate[ed] specific powers and responsibilities to a branch fitted to the

task" thereby "allow[ing] the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance").

However, under the structure Congress created, the removal power is not vested in the President, although to the public he appears to remain responsible for the Board's actions given its exercise of executive authority. Indeed, PCAOB members are in effect subject to removal without cause only by Congress, as Congress can simply pass a new law dissolving the board altogether or taking any other adverse actions that do not run afoul of the Bill of Attainder Clause. Accordingly, the PCAOB is more beholden to Congress than to the President, or even the SEC, despite its exercise of executive authority.

This Court has warned that such disregard of the Constitution's careful division of governmental authority among the coordinate branches will lead to disastrous results: "To disregard structural legitimacy is wrong in itself—but since structure has purpose, the disregard also has adverse practical consequences." *Mistretta v. United States*, 488 U.S. 361, 421 (1989) (Scalia, J. dissenting). "[I]n the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous." *Id.* at 427.

"It remains one of the most vital functions of this Court to police with care the separation of the governing powers. That is so even when . . . no immediate threat to liberty is apparent. When structure fails, liberty is

always in peril." *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J. concurring). This Court must vindicate the Executive's removal power in this case in order to prevent the PCAOB from continuing to wreak havoc on public companies, small businesses, and shareholders—indeed, on the economy as a whole—because the PCAOB is unresponsive and unaccountable to the body politic.

ARGUMENT

I. STRIPPING THE PRESIDENT OF HIS POWER TO REMOVE MEMBERS OF THE PCAOB IS INCONSISTENT WITH THE DECISION OF 1789

Any analysis of the removal power must begin with the Decision of 1789.[7] In 1789, the First Congress debated whether to adopt a bill creating the Department of Foreign Affairs. The original draft of that bill provided that the Secretary of Foreign Affairs could "be removed from office by the President of the United States." *See* Daily Advertiser (June 17, 1789), *reprinted in Debates in the House of Representatives, First Session: June-September 1789*, 11 Documentary History of the First Federal Congress, 1789-1791, at 842 (Charlene Bangs Bickford et al. eds., 1992) ("*Debates*"). Representative Alexander White of Virginia moved that this language be deleted, and the House of Representatives debated the issue extensively over a

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[7] *See, e.g., Parsons v. United States*, 167 U.S. 324, 328-30 (1897); *Myers v. United States*, 272 U.S. 52, 111-136 (1926); *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986).

four-day period. *Id.* The motion was rejected by a 34-20 vote. *Id.* at 999, 1024; *see also Myers*, 272 U.S. at 112.

Representative Egbert Benson of New York proposed a new amendment that "would more fully express the sense of the committee" regarding the power to remove. *Id.* at 1027. That proposal provided that the Chief Clerk of the Department of Foreign Affairs would have custody of papers "[w]henever the said principal officer [] shall be removed by the President, or a vacancy in any other way shall happen." *Id.* If this amendment passed, Benson announced that he would move to strike the provision stating that the Secretary would be removable by the President, since that text implied a grant of removal power from Congress to the President (a concept with which, he believed, most members of the House disagreed). *Id.* at 1028; *see also id.* at 1027 (stating that Benson thought this implication was improper "because it would be admitting the house to be possessed of an authority which would destroy [the Constitution's] checks and balances"); *Myers*, 272 U.S. at 113. The goal, Rep. Benson stated, was to "establish a legislative construction of the constitution."[8] *Id.* at 1028.

Both amendments passed, and the bill was ultimately enacted into law without further modification. Journal of the First Session of the House

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[8] Indeed, this Court has found that the Decision of 1789 was such a legislative interpretation of the Constitution. *See Myers*, 272 U.S. at 114 ("[T]here is not the slightest doubt, after an examination of the record, that the vote was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone.").

of Representatives of the United States (June 22, 1789), *reprinted in House of Representatives Journal*, 3 Documentary History of the First Federal Congress, 1789-1791, at 91-95 (Charlene Bangs Bickford et al. eds., 1992); Foreign Affairs Bill, H.R. 8, 1st Cong. (1789), *reprinted in Legislative Histories*, 4 Documentary History of the First Federal Congress, 1789-1791, at 696-97 (Charlene Bangs Bickford & Helen E. Veit eds., 1986).

Madison was one of the chief proponents of the view of Benton and others that the power to remove was granted to the President by the Constitution itself because the Constitution grants the executive power to the President alone. *Debates*, at 868. As the Constitution set forth specific limits on executive authority, including the requirement of the Senate's advice and consent in appointments, Congress could not "diminish or modify" the President's executive authority any further. *Id.*; *see also Myers*, 272 U.S. at 113 ("Gentlemen have all along proceeded on the idea that the Constitution vests the power in the President, and what arguments were brought forward respecting the convenience or inconvenience of such disposition of the power were intended only to throw light upon what was meant by the compilers of the Constitution.") (quoting 1 Annals of Congress, 578, 579 (Madison)).

The power of removal, Madison thought, was quintessentially executive: "I conceive that if any power whatsoever is in its nature executive it is the power of appointing, overseeing, and controlling those who execute the laws." *Debates*, at 868. Presidential control, recognized Madison and others, required the threat of

removal.[9] *See id.* (Rep. Madison, stating that where the President has the power to remove, "the chain of dependence [will] be preserved; the lowest officers, the middle grade, and the highest will depend, as they ought on the President"); *Debates*, at 880 (Rep. Ames stating that, in order for the President to be "responsible to his country, he must have a choice in selecting his assistants, a control over them, with power to remove them when he finds the qualifications which induced their appointment cease to exist"). Any other result would be "subject[] to legislative instability," *Debates*, at 1029-30, which was not desirable given the fact that the "union [of executive and legislative powers] under the Confederation had not worked well," *Myers*, 272 U.S. at 116.

It was precisely for this reason that most found the original text of the Foreign Affairs Act to be problematic—it could be read "as a grant of authority rather than a confirmation of constitutional authority." Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1042 (2006) (citing *Debates*, at 1029); *see also Debates*, at 1029 (Rep. Madison commenting that the original language of the bill could be understood as a legislative grant of removal power

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[9] "As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that, as part of his executive power, he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that, as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible." *Myers*, 272 U.S. at 117.

rather than confirming pre-existing removal power); *Myers*, 272 U.S. at 112 (summarizing Rep. Benson's statements). By contrast, "it is extremely difficult to read the final Foreign Affairs bill that emerged from the House . . . as somehow containing an implicit grant of removal authority to the President." *Id.* at 1046.

Indeed, evidence suggests that even those who voted *against* Rep. Benson's amendments believed that the Constitution granted the President the power to remove. For example, Rep. Fitzsimons voted against the second amendment (to eliminate the language that the Secretary could "be removed from office by the President of the United States") precisely because he thought that the Constitution granted the President such authority, and he believed it was important for Congress to affirmatively recognize that fact. *See Correspondence, First Session: June-August 1789*, 16 Documentary History of the First Federal Congress, 1789-1791, at 819-20 (Charlene Bangs Bickford et al. eds., 2004) ("*Correspondence*"). The Gazette of the United States reported that others also held this view. *See Debates*, at 1026, 1028; *see also* Prakash, 91 Cornell L. Rev. at 1052 (noting four other representatives who believed that removing this language would undermine the notion that the Constitution granted removal power to the President).

Two other acts, debated and enacted in the wake of the enactment of the Foreign Affairs Act, contained language nearly identical to that introduced into the Foreign Affairs Act by Benson. Each provided for the custody of all departmental papers "whenever [the agency head] shall be removed from office by the

President of the United States." *See* An Act to Establish the Treasury Department, ch. 12, § 7, 1 Stat. 65, 67 (1789); An Act to Establish an Executive Department, to be Denominated the Department of War, ch. 7, § 2, 1 Stat. 49, 50 (1789). Madison explained in letters to Jefferson that the operative language used in all three statutes was specifically selected to confirm that the Constitution granted removal power to the President, and that this interpretation of the Constitution was the truest to that document's "policy of mixing the Legislative and Executive Departments as little as possible, and to the requisite responsibility and harmony in the Executive Department." *Correspondence*, at 890, 893.

The Decision of 1789 thus established that the removal "power was vested in the president alone." *Parsons*, 167 U.S. 324, 331 (1897). This determination, reached both by those who voted in favor of Benson's amendments and against them, provides unique insight into the Framers' understanding of the origin and proper scope of the presidential removal power. An act "passed by the first Congress assembled under the constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning." *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888). Thus, this Court has recognized that the Decision of 1789 is especially probative of the Framers' intent because it

> was the decision of the First Congress on a question of primary importance in the organization of the government made within two years after the Constitutional Convention and within a much

> shorter time after its ratification, and . . . because that Congress numbered among its leaders those who had been members of the convention. It must necessarily constitute a precedent upon which many future laws supplying the machinery of the new government would be based and, if erroneous, would be likely to evoke dissent and departure in future Congresses.

Myers, 272 U.S. at 136; *see also id.*, 272 U.S. at 114 (stating that eight members of the House of Representatives had been in the Constitutional Convention, and of those six voted in favor of the bill); *Bowsher*, 478 U.S. at 723-724 (stating that the "Decision of 1789 provides contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument") (quotations omitted).[10]

Later presidential administrations have agreed with this Court's repeated pronouncements regarding the significance of the Decision of 1789. President Taft observed that "[i]t was settled, as long ago as the first Congress, . . . that even where the advice and consent of the Senate was necessary to the appointment of an officer, the President had the absolute power to remove

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[10] That the Decision of 1789 was a construction of the Executive's constitutional authority made by the Congress—and thus a statement against interest made by the coordinate branch most likely to aggrandize its power at the expense of another branch, *see N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982)—only adds to its significance and further demonstrates that it accurately reflects the Constitution's original public meaning.

him without consulting the Senate. This was on the principle that the power of removal was incident to the Executive power and must be untrammeled." William H. Taft, *Our Chief Magistrate and His Powers* 56 (1916). President Tyler's administration held the same view: "It is according to [the settled construction of 1789], from the very nature of executive power, absolute in the President, subject only to his responsibility to the country (his constituent) for a breach of such a vast and solemn trust." 4 Op. Att'y Gen. 1, 1-2 (1842).

In short, the Decision of 1789 made clear that the power to remove is inherently executive in nature, a power necessary to "take Care that the laws be faithfully executed," U.S. Const. art. 2, § 3, and accordingly "vested in a President of the United States of America," U.S. Const. art. 2, § 1. *See Myers*, 272 U.S. at 117; *Buckley v. Valeo*, 424 U.S. 1, 136 (1976); *Bowsher*, 478 U.S. at 723. Moreover, that decision, which focused on the nature of executive power and the relationship between removal and control was not limited to the President's power over principal officers only, but would apply equally to the President's power to remove inferior officers as well or indeed any other officer executing executive authority. *See* Prakash, 91 Cornell L. Rev. at 1069-70.

The Decision of 1789 makes clear that the Framers never could have envisioned, much less endorsed, the Sarbanes-Oxley Act's "unique and apparently unprecedented double for-cause removal" scheme. *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 704 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). As the Court below explained, "the [SEC]

has sole removal authority under the Act." *Free Enterprise Fund*, 537 F.3d at 675. Like the President's ability to remove SEC commissioners, *see SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988), the SEC's power to remove PCAOB members is subject to for-cause restrictions. Worse still, "the statutory restriction on the SEC's removal of the Board is far more stringent than the typical for-cause removal restriction." *Id.* at (Kavanaugh, J., dissenting). *See* 15 U.S.C. § 7217(d)(3)(A)-(C) (permitting removal only where a member has "willfully" violated the law, "willfully abused" his or her authority, or "failed to enforce compliance" "without reasonable justification or excuse"). Having rejected statutory provisions that would have implied that the President's removal authority might be subject to congressional oversight, the First Congress clearly would not have countenanced Sarbanes-Oxley's stripping of all the President's removal power over the members of the PCAOB.

II. THE RESTRICTIONS ON THE PRESIDENT'S ABILITY TO REMOVE PCAOB MEMBERS ARE INCONSISTENT WITH TWO CENTURIES OF HISTORICAL PRECEDENT

For more than two centuries, the Executive Branch has consistently asserted that the Framers deliberately (and wisely) decided not to place any check on the President's exercise of the removal power and has resisted Congressional attempts to do so. This historical analysis is highly relevant because this Court has instructed that the judiciary's constitutional analysis ought to be informed by the interpretation of

constitutional law regularly adhered to by a coordinate branch of the government. Indeed, this Court has employed such an approach as part of its interpretive methodology. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919 (1983) (striking down the legislative veto because, *inter alia*, eleven Presidents who had been presented with the issue went on record challenging its constitutionality); *Myers*, 272 U.S. at 148, 150 (holding that Congress could not limit the removal power because, *inter alia*, the Executive Branch viewed the power as "unrestricted").

Sarbanes-Oxley's severe restrictions on the President's removal authority are inconsistent with this historical precedent. Moreover, the regrettable consequences of past congressional attempts to intrude upon the removal power serve only to vindicate the Executive Branch's long-held view of the removal power.

A. The Executive Branch Consistently Has Interpreted the Removal Power Broadly and Resisted Congressional Efforts to Limit That Power

Ever since the Decision of 1789, the Executive Branch has staunchly defended the removal power—with regard to both principal and inferior officers—against congressional encroachments. James Madison, for example, stated that the Constitution's text prohibits the Senate from conditioning the President's removal power:

> If the constitution has invested all executive power in the President, I venture to assert that the

> Legislature has no right to diminish or modify his executive authority.
>
> The question now resolves itself into this, Is the power of displacing, an executive power? *I conceive that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws.*

1 Annals of Cong. 481-82 (emphasis added).

President Jackson repeatedly clashed with Congress over proposed restrictions on his removal power. Members of Congress introduced at least four separate measures in the 1830s aimed at limiting his removal power. In a communication to the Senate defending his unconditional power of removal, President Jackson made plain that because the Executive Vesting Clause and the Take Care Clause made him "responsible for the entire action of the executive department, it was but reasonable that the power of appointing, overseeing, and controlling those who execute the laws—a power in its nature executive—should remain in his hands." Andrew Jackson, Message to the Senate Protesting Censure Resolution (Apr. 15, 1834), *available at* www.presidency.ucsb.edu/ws/index.php?pid=67039&st=st1=. As President Jackson explained, the "whole executive power being vested in the President, who is responsible for its exercise, it is a necessary consequence that he should have a right to employ agents of his own choice to aid him in the performance of his duties, *and to discharge them when he is no longer willing to be responsible for their acts.*" *Id.* (emphasis added). Therefore, "[i]n strict accordance with this principle,

the power of removal, . . . [an] executive power, *is left unchecked by the Constitution in relation to all executive officers*." *Id.* (emphasis added). Significantly, Congress ultimately rejected all of these attempts to limit President Jackson's removal power. *See* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During The First Half-Century*, 47 CASE WEST. RES. L. REV. 1451, 1534 (1997).

Less than two decades later, President Fillmore directed his Attorney General to draft an opinion regarding the propriety of removing the Chief Justice of the Territory of Minnesota "for very serious charges of incapacity, unfitness, and want of moral character." Executive Authority to Remove the Chief Justice of Minnesota, 5 U.S. Op. Atty. Gen. 288, 288-89 (Jan. 23, 1851); *see also Parsons*, 167 U.S. at 333-34 (discussing this opinion). The opinion found that the territorial court was a "legislative court" rather than an Article III court, and noted that the justices of that court "shall hold their offices during the period of four years." *Id.* at 289. Citing the Decision of 1789, Attorney General John J. Crittenden opined that, "[b]eing civil officers, . . . they are not exempted from that executive power which, by the constitution, is vested in the President of the United States over all civil officers appointed by him; and whose tenures of office are not made by the constitution itself more stable than during the pleasure of the President of the United States." *Id.* at 290. "That the President has, by the constitution of the United States, the power of removing civil officers appointed and commissioned by him . . . has been long since settled, and has ceased to be a subject of controversy or doubt." *Id.* Summarizing his advice to

President Fillmore, General Crittenden noted that "the power of removal is vested by the constitution in the President of the United States to promote the public welfare, to enable him to take care that the laws be faithfully executed, to make him responsible if he suffers those to remain in office who are manifestly unfit and unworthy of public confidence," and advised that the President had the power to remove the chief justice "for any cause that may, in your judgment, require it." *Id.* at 291.

President Cleveland continued this defense of the removal power by removing United States Attorney Parsons, an inferior officer,[11] from his office despite a federal statute providing that his appointment was "for four years." *Parsons*, 167 U.S. at 326. Cleveland's administration defended the President's removal power all the way to this Court, which flatly rejected Parsons' argument that the federal act could limit the President's removal power. The Court observed that, beginning with the Decision of 1789, the Executive Branch strongly defended the unrestricted nature of the removal power in a number of significant cases and that Congress had eventually acquiesced in the view that the Legislature could not impose any conditions on the President's removal power. *See id.* at 328-334.

President McKinley also firmly defended the removal power against congressional intrusion. The Customs Administration Act provided that the

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[11] *See* United States Attorneys—Suggested Appointment Power of the Attorney General, 2 Op. Off. Legal Counsel 58, 59 (Feb. 28, 1978) ("U.S. Attorneys can be considered to be inferior officers").

President could remove certain civil officers "for inefficiency, neglect of duty, or malfeasance in office[.]" *Shurtleff v. United States*, 189 U.S. 311, 313 (1903). When the President removed one of these inferior officers (Shurtleff) without providing a reason for his action, Shurtleff filed suit. *See id.* at 315-16. This Court agreed with President McKinley and rejected the "for cause" removal language because a contrary result "would involve the alteration of the universal practice of the government for over a century." *Id.* at 316.

President Coolidge's administration ranks as one of the most ardent defenders of the removal power, most notably due to its position in *Myers v. United States*. There, this Court addressed "whether under the Constitution the President has the exclusive power of removing executive officers"—a question the Court answered in the affirmative. *Myers*, 272 U.S. at 106. In the administration's brief to this Court, President Coolidge's Solicitor General explained the history of the President's plenary removal power, starting with the Decision of 1789 and continuing through over one hundred years of government practice. Solicitor General Beck wrote that, "[f]rom the Beginning of the Government removal has been recognized as essentially an executive function," and drew the Court's attention to the numerous Attorney General opinions defending the unilateral nature of the Executive removal power. Brief of the United States, *reproduced in Myers*, 272 U.S. at 99, 104-106.

Presidents also have opposed congressional attempts to force particular executive officers out of their positions by disqualifying them from their offices.

For example, President Truman argued that allowing Congress to effectively remove officers by arbitrarily enacting new qualifications would impinge on his removal powers. *See* Statement by the President on the Interior Department Appropriation Act (June 30, 1948), *available at* www.presidency.ucsb.edu/ws/index.php?pid=12949 ("This rider is designed to effect the removal of two men now holding such positions who have supported the public power policy of the Government and the 160-acre law which assures that Western lands reclaimed at public expense shall be used for the development of family size farms. . . . This type of legislation does great harm to our democratic principles. It is contrary to the spirit, if not the letter, of those provisions of the Constitution which guarantee the separation of legislative and executive functions"). President Truman continued to defend the removal power until Congress finally yielded and deleted the changes in the qualifications for the posts. *See* Interior Department Appropriation Act, 63 Stat. 765, 778-79 (1949).

President Nixon likewise opposed congressional efforts to throw his executive officers out of their offices. He vetoed a bill that attempted to remove two inferior officers—the Director and Deputy Director of OMB—from their offices by abolishing their positions and at the same time recreating them as positions subject to Senate confirmation. President Nixon found the bill to be nothing more than a congressional attempt to circumvent the Executive's removal power. *See* Veto of a Bill Requiring Senate Confirmation of the Director and Deputy Director of the Office of Management and

Budget (May 18, 1973), *available at* www.presidency.ucsb.edu/ws/index.php?pid=3851&st=&st1= ("This legislation would require the forced removal by an unconstitutional procedure of two officers now serving in the executive branch. This step would be a grave violation of the fundamental doctrine of separation of powers. In view of my responsibilities, it is my firm duty to veto this bill."). Congress failed to override his veto.

More recently, the Executive Branch has stood its ground to defend against congressional attacks on the removal power through agency overhauls. In particular, President Clinton opposed a congressional attempt to limit the President's authority to remove the Administrator of the Social Security Administration. As part of legislation transforming the SSA into an independent agency, Congress made the Administrator removable only for "neglect of duty or malfeasance in office." 42 U.S.C. § 902(a)(3) (2000). While signing the bill, President Clinton stated that these limitations on his removal authority were constitutionally problematic, and he recommended "a corrective amendment to resolve this constitutional question." *See* Statement on Signing the Social Security Independence and Program Improvements Act of 1994 (Aug. 15, 1994), *available at* www.presidency.ucsb.edu/ws/index.php?pid=48981.

Likewise, President George W. Bush strongly asserted his removal authority during the creation of the Department of Homeland Security. *See, e.g.*, Statement of Administration Policy: H.R. 5005 - Homeland Security Act of 2002 (July 25, 2002), *available at* http://www.presidency.ucsb.edu/ws/index.

php?pid=24644 (expressing support for the House bill, which "preserved the President's long-standing authority to exempt the [Department of Homeland Security] from the operation of the Federal Labor Relations Management Act"). President Bush insisted upon having unfettered power to dismiss lower-level department employees and ultimately defeated Congress on the issue. *See* Christopher S. Yoo, Steven G. Calabresi, and Anthony J. Colangelo, *The Unitary Executive in the Modern Era*, 1945-2004, 90 IOWA L. REV. 601, 727 (2005).[12]

B. The Regrettable Consequences of Intrusions Upon the Removal Power Serve Only to Vindicate the Executive Branch's Long-Held View of the Removal Power

As shown above, our nation's Presidents have uniformly rebuffed congressional efforts to interfere

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[12] In modern times, the Executive Branch has made clear that the President must have the power to remove an official exercising executive power "regardless of who appointed" that official. *See Removal of Court-Appointed U.S. Attorney*, 3 Op. Off. Legal Counsel 448, 450 (1979) ("[T]he President is responsible for the conduct of a U.S. Attorney's Office and therefore must have the power to remove [the U.S. Attorney, an inferior officer, if the President] believes [the U.S. Attorney] is an unsuitable incumbent, regardless of who appointed him." (emphasis added)); *see also Statute Limiting the President's Authority To Supervise the Director of the Centers for Disease Control in the Distribution of an AIDS Pamphlet*, 12 Op. Off. Legal Counsel 47 (1988) (arguing that Congress may not constitutionally interfere with President's authority to supervise and remove the director of the Centers for Disease Control, an inferior officer appointed by a department head).

with the Executive removal power. The circumstances surrounding two congressional acts in particular—the Tenure In Office Act and the Ethics In Government Act—deserve special consideration because in both cases, regrettable consequences ultimately forced Congress to accept the Executive Branch's long-held view of the removal power.

1. The Tenure in Office Act

In 1867, Congress passed the Tenure In Office Act, under which no civil officers appointed by the President with the advice and consent of the Senate could be removed from office unless the Senate confirmed a successor. After Congress passed this legislation, however, President Andrew Johnson mounted one of the most vigorous defenses of the removal power in history. President Johnson determined that the text of the Constitution and the unbroken practices of both Congress and the Executive Branch prohibited Congress from interfering with the removal power in the manner attempted. *See* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During The Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667, 748 (2003). Accordingly, President Johnson vetoed the legislation.

In a message accompanying his veto, President Johnson made his position clear: "That the power of removal is constitutionally vested in the President of the United States is a principle which has been not more distinctly declared by judicial authority and judicial commentators than it has been uniformly practiced upon by the legislative and executive departments of the government." Andrew Johnson, Veto Message to the

Senate (Mar. 2, 1867), *available at* www.presidency.ucsb.edu/ws/index.php?pid=72071&st=&st1=. Notwithstanding President Johnson's robust defense of the removal power, Congress overrode the President's veto and enacted the Tenure In Office Act. Remaining steadfast in his position, President Johnson removed his Secretary of War without complying with the Tenure In Office Act. In response, Congress voted to impeach the President of the United States for the first time in our nation's history. However, the Senate voted not to remove President Johnson from office, implicitly acknowledging that he was not wrong to disregard what Congress later conceded was an unconstitutional statute.

After President Johnson left office, Presidents Grant and Cleveland maintained Johnson's defense of the removal power. *See* Ulysses S. Grant, First Annual Message (Dec. 6, 1869), *available at* www.presidency.ucsb.edu/ws/index.php?pid=29510&st=&st1=. Congress acceded to President Grant's view and partially repealed the Tenure In Office Act. *See* Act of Apr. 5, 1869, ch. 10, § 2, 16 Stat. 6, 7. President Cleveland declared that "the power to remove or suspend such officials is vested in the president alone by the Constitution." Grover Cleveland, Special Message to the Senate (Mar. 1, 1886), *available at* www.presidency.ucsb.edu/ws/index.php?pid=71867&st=&st1=. Public opinion eventually turned against the Tenure in Office Act and Congress repealed the Act in its entirety. *See* Act of Mar. 3, 1887, ch. 353, 24 Stat. 500.

2. The Ethics in Government Act

The Ethics In Government Act charted much the same course as the Tenure In Office Act. The Carter administration opposed the creation of a judicially appointed independent counsel[13] designed to ferret out misconduct at the highest levels of the Executive Branch, but it lacked the political power to defeat passage of the Act. President Reagan's subsequent administration, however, launched a vigorous attack on the Act. Executive Branch officials repeatedly challenged the constitutionality of the Act in hearings before Congress, and President Reagan himself challenged the Act's limits on his removal power. *See* Statement on Signing the Independent Counsel Reauthorization Act of 1987 (Dec. 15, 1987), *available at* www.presidency.ucsb.edu/ws/index.php?pid=33827 &st=&st1=.

The Reagan administration ultimately launched a full-scale attack on the Act, challenging its constitutionality in court in connection with the Independent Counsel's investigation of then-Assistant Attorney General Theodore Olson. Although the Reagan administration's judicial challenge ultimately was unsuccessful in this Court, *see Morrison v. Olson*, 487

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[13] The independent counsel provisions of the Act were reenacted by the Ethics in Government Act Amendments of 1982, Pub. L. 97-409, 96 Stat. 2039, the Independent Counsel Reauthorization Act of 1987, Pub. L. 100-191, 101 Stat. 1293, and the Independent Counsel Reauthorization Act of 1994 Pub. L. 103-270, 108 Stat. 732. It has been referred to popularly as the Independent Counsel Act.

U.S. 654 (1988),[14] President Reagan's Solicitor General vigorously defended his removal power: "Whatever limits Congress may constitutionally impose on the President's various means of holding other officers to account, it may not deny his power to remove purely executive officers like an independent counsel." Brief for the United States as Amicus Curiae Supporting Appellees at 29, *Morrison v. Olson,* 487 U.S. 654 (1988) (No. 87-1279).

President George H.W. Bush and Attorney General William Barr reiterated the Executive Branch's view that the Act was unconstitutional, and President Bush repeatedly threatened to veto any attempt to extend the Act past its scheduled sunset in 1992.

Then, during President Clinton's administration, the Ethics In Government Act engendered a constitutional crisis that ultimately resulted in the death of the Act. Attorney General Janet Reno authorized an investigation of President Clinton by Independent Counsel Kenneth Starr, which culminated in a decision by the House to impeach the President. Like President Johnson, President Clinton was acquitted by the Senate. But by then, even initial champions of the Ethics In Government Act recognized that the Act rested on an unconstitutional foundation. Some even campaigned for its demise: "In 1993, as many of you know, I testified in support of the statute .... However, after working with the Act, I have come

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[14] Notably, the removal provisions at issue in *Morrison* did not impinge on the Executive's removal power nearly as much as the double for-cause limitations at issue here. *See* Pet. at 18-23.

to believe . . . that the Independent Counsel Act is structurally flawed and that those flaws cannot be corrected within our constitutional framework." *Future of the Independent Counsel Act: Hearings Before the Senate Comm. On Governmental Affairs*, 106th Cong. 243, 247-48 (1999) (statement of Attorney General Janet Reno). In light of the bipartisan recognition of the Act's failures—both in practice and as a constitutional matter—Congress allowed the Act to sunset.

Both the Tenure In Office Act and the Ethics In Government Act remain in the legislative dustbin. The demise of these statutes highlights the "adverse practical consequences" of disregarding the Constitution's structural principles. *Mistretta*, 488 U.S. at 421 (Scalia, J., dissenting). Moreover, that these statutes were ultimately considered unconstitutional by some of their initial supporters demonstrates that the constitutional crises they engendered might well have been avoidable, had the text and history of Article II been properly considered at the outset.

Like the Tenure in Office Act and the Ethics in Government Act, Sarbanes-Oxley's severe restrictions on the President's removal power have regrettable consequences, including heavy burdens on public companies and reductions in the enterprise value of public companies on the whole. *See supra* nn. 4-6 and accompanying text. With the President powerless to prevent the PCAOB from lording over American public companies with a heavy hand, even the laudable goals of

Sarbanes-Oxley no longer support this structure.[15] Like the Tenure in Office Act and the Ethics in Government Act, Sarbanes-Oxley's "improvisation of a constitutional structure on the basis of currently perceived utility" is disastrous, and it should be discarded immediately. *See Mistretta*, 488 U.S. at 427 (Scalia, J. dissenting).

* * *

The fundamental problem with Sarbanes-Oxley and the PCAOB is a matter of first principles. The government derives its powers from the People: "Governments are instituted among Men, deriving their just powers from the consent of the governed." The Declaration of Independence para. 2 (U.S. 1776); *see also United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring) ("The Constitution is based on a theory of original, and continuing, consent of the governed."); *Nevada v. Hall*, 440 U.S. 410, 426 (1979) ("In this Nation each sovereign governs only with the consent of the governed."). It is clear that Congress lost sight of this basic, fundamental truth in enacting Sarbanes-Oxley. Indeed, Congress went to great lengths to ensure that the PCAOB was unaccountable to the people, granting it "massive powers" that would be "unchecked" by the political process, Gramm Statement, *supra*, p.2.

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[15] Indeed, Rep. Michael Oxley, one of the two sponsors of Sarbanes-Oxley, has acknowledged the negative consequences of the law: "Frankly, I would have written it differently, and [Sen. Paul Sarbanes] would have written it differently." Liz Alderman, "Spotlight: Michael Oxley," New York Times (March 2, 2007), *available at* http://www.nytimes.com/2007/03/02/business/worldbusiness/02iht-wbspot03.4773621.html?_r=1.

The faithful execution of the laws is the responsibility of the President. *See* U.S. Const. art. 2, § 3 ("[H]e shall take Care that the Laws be faithfully executed."). And the President's responsibility to the people requires that he hold the power to remove officials who exercise executive power. *See Myers*, 272 U.S. at 117; *Debates*, at 868, 880 (statements of Madison and Ames). The Framers intended for this structure in order to maintain proper lines of authority through the Executive Branch. Adhering to this structure would ensure that the Executive would remain accountable to the people, *see Bowsher*, 478 U.S. at 722, in whom power ultimately resides. *See Broadrick v. Oklahoma*, 413 U.S. 601, 620 (1973) (Douglas, J., dissenting) ("'[W]e the people' are the sovereigns, not those who sit in seats of the mighty.").[16]

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[16] Importantly, because the questions of Executive power at issue in this case implicate the individual liberty of the people, the Executive Branch's support of the mechanisms for the appointment and removal of PCAOB members cannot save them. As Justice Blackmun recognized in *Freytag*, "[t]he structural principles embodied in the Appointments Clause do not speak only, or even primarily, of Executive prerogatives[.]" *Freytag*, 501 U.S. at 880. Violations of the clause are therefore not within the power of the Executive to waive. "The structural interests protected by the Appointments Clause are not those of any one branch of Government, but of the entire Republic." *Id.*; *see also New York v. United States*, 505 U.S. 144, 182 (1992) ("The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment."); *id.* ("The constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed.").

By stripping the President of all power to remove the members of the PCAOB, Congress made them unaccountable to the Executive and thus unaccountable to the body politic. In creating this dangerous pairing of power and lack of accountability, Congress all but assured that the PCAOB would run roughshod over public companies, small businesses, and shareholders without being held responsible for such conduct. This Court should not hesitate to vindicate first principles, preserve the Constitution's sacred structure, and return power to its rightful place—the coordinate branches to which the Constitution assigns it, and more importantly, to the People.

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-861

IN THE

Supreme Court of the United States

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,

Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

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STATEMENT OF INTEREST[1]

Amici curiae are law professors who teach, research, and write about constitutional law. *Amici* have a professional interest in this Court's interpretation of the removal and appointment powers.

SUMMARY OF ARGUMENT

The balancing test announced in *Morrison v. Olson* for determining the constitutionality of a statutory restriction on the President's removal power is inconsistent with the Constitution's text and enactment history, the past 220 years of our nation's practice, and policy considerations. The unworkability of balancing tests and changes in our nation's commitments (reflected in Congress's decision to allow the Ethics in Government Act to lapse after a decade of unsatisfactory experience) support the conclusion that *Morrison* should be overruled.

The manner in which members of the Public Company Accounting Board (PCAOB) are appointed violates the Appointments Clause. Both of the tests for determining whether an officer is an inferior officer—one focusing on the officer's location within the federal hierarchy and the other focusing on the scope of the officer's responsibilities—indicate that

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[1] Counsel for all parties received timely notice and have consented to the filing of this brief. No counsel for any party in this case authored any part of this brief. No person or entity other than *amici* contributed monetarily to its preparation or submission.

PCAOB members must be nominated by the President and subject to the advice and consent of the Senate.

ARGUMENT

I. THE REMOVAL POWER

In *Morrison* v. *Olson*, the Supreme Court held a statutory limitation on the President's removal power violates the Constitution if it "impermissibly interfere[s] with" the President's ability to supervise the execution of federal law. 487 U.S. 654, 660, 685 (1988).[2] We believe that arguments from the constitutional text, pre-Framing history, practice over the last 220 years, and policy all indicate that *Morrison* ought to be overruled. Instead, this Court should recognize that Presidents have the power to remove at will all persons exercising executive authority on their behalf. While this case can be decided in favor of petitioners without overruling *Morrison*, it provides a welcome opportunity to clarify the law by rejecting *Morrison* as a problematic and flawed precedent.

A. Textual Arguments

The Framers' decision to give the President control over all officials wielding federal executive authority is clearly demonstrated by the

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[2] In other portions of the opinion, the Court asked whether the statutory restriction "unduly trammel[s]" on, "impermissibly burdens," "interfere[s] impermissibly with," or impermissibly undermine[s]" the president's authority to oversee the execution of the law. 487 U.S. at 692, 693, 696.

Constitution's text.[1] Article II, section 1, provides, "The executive Power shall be vested in a President of the United States." The leading 18th-century dictionary defines "vest" as "[t]o place in possession of" an individual or entity. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed., London, J.F. & C. Rivington et al. 1785) [hereinafter JOHNSON]. It derives from the Latin word "vestis" for outer garment and is related to the word "vestments" (i.e., the robes of church office). THE BARNHART DICTIONARY OF ETYMOLOGY 1201 (Robert K. Barnhart ed., 1988) [hereinafter BARNHART DICTIONARY]. It signifies the "clothing" of an official or of an institution with the general trappings and realities of power. The natural reading of the Article II Vesting Clause is thus as an affirmative grant to the President of the power to execute the laws.

Indeed, this Court has long recognized the Article II Vesting Clause as a grant of the power to oversee the executive branch, including the removal power. For example, in *Myers v. United States*, this Court construed the Article II Vesting Clause as a "grant of the power to execute the laws," which carried with it "the reasonable implication, even in the absence of express words," of the "power of removing those for whom he cannot continue to be responsible." 272 U.S. 52, 117, 163–64 (1926); *see also Buckley v. Valeo*, 424 U.S. 1, 135 (1976) (reaffirming the above-quoted language from *Myers*). Similarly, in *Nixon v. Fitzgerald*, this Court described the Article II Vesting

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[1] For a more complete explication of the textual argument, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 559–593 (1994).

Clause as a "grant of authority establish[ing] the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity," including "management of the Executive Branch—a task for which 'imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties.'" 457 U.S. 731, 750 (1982) (quoting *Myers*, 272 U.S. at 134–35); *see also Clinton v. Jones*, 520 U.S. 681, 699 n.29 (1997) (reaffirming the above-quoted language from *Fitzgerald*); *id.* at 712 (Breyer, J., concurring) (construing art. II, §1, as a "constitutional delegation" that "makes a single President responsible for the actions of the Executive Branch").

Construing the Vesting Clause in this manner falls far short of recognizing a prerogative power to legislate or to act in the absence of legislation. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952). It need encompass nothing more than the power to oversee the proper execution of the duly enacted laws. Although some have suggested that the Article II Vesting Clause simply specifies the President's title rather than serve as a grant of power, *id.* at 640–41 (Jackson, J., concurring in the judgment), such a construction would not accord with the ordinary meaning of the word "vest," which connotes a conferral of power.

Interpreting the Article II Vesting Clause as a grant of authority to execute the laws is consistent with the way that the word "vest" is used in other clauses of the Constitution. For example, the Necessary and Proper Clause provides, "The

Congress shall have power . . . To make Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all others Powers *vested* by this Constitution in the Government of the United States, or in any Department or officer thereof." U.S. CONST. art. I, §8, cl. 18 (emphasis added).[1] Furthermore, the Appointments Clause provides that "the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art. II, §2, cl. 2. Both provisions use the term "vest" as the empowerment of an institution.

Lastly, construing the Article II Vesting Clause as a grant of the executive authority is consistent with the traditional construction of the Article III Vesting Clause, which similarly provides, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, §1, cl. 1. This Clause is generally regarded as a grant of judicial power that limits Congress's authority to limit the Court's jurisdiction. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 331 (1816); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §826, at

[1] Although the Necessary and Proper Clause gives Congress considerable flexibility in the means to implement its constitutional powers, that flexibility does not authorize any infringement of the President's constitutional powers. *See Buckley*, 424 U.S. at 135–36 (drawing an analogy to the removal cases to hold that the Necessary and Proper Clause does not give Congress the authority to interfere with the President's appointment power).

589 (Boston, Hilliard, Gray & Co. 1833) [hereinafter STORY]. Both of the Article II and III Vesting Clauses stand in stark contrast to the Article I Vesting Clause, which provides, "All legislative Powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, §1 (emphasis added). The inclusion of "herein granted" in the Article I Vesting Clause has long been understood to limit the powers granted to Congress to those enumerated in Article I, in contrast to the broader language employed in Articles II and III. *Myers*, 272 U.S. at 138; 15 THE PAPERS OF ALEXANDER HAMILTON 39 (Harold C. Syrett ed., 1969) [hereinafter PAPERS OF ALEXANDER HAMILTON].

The Constitution's text thus provides strong support for the President's authority to oversee the execution of the law through the power of removal.

B. Historical Context of the Framing

1. 17th and 18th Century England

17th and 18th century English law, which served as the backdrop for the Framers' understanding the scope of the executive power under the Constitution, recognized that the King of England unquestionably possessed the power to remove judicial and executive officers alike. *See* CATHERINE DRINKER BOWEN, THE LION AND THE THRONE 370-90, 477-504 (1956). In 1701, the Act of Settlement specified that judges would thereafter hold their offices during good behavior. 12 & 13 Will. 3, c. 2, §3 (Eng.). The Act provided no such tenure for executive officials, and English Kings continued to remove executive officers.

Indeed, Parliament did not even ask the King to remove a Prime Minister until 1783. PETER WHITELEY, LORD NORTH: THE PRIME MINISTER WHO LOST AMERICA 201–04 (1996).

2. The National Government Prior to the Framing

The experience under the national government prior to Framing reaffirmed the need for strong centralized control over the executive branch. Between 1776 and to 1787, the Continental Congress performed both the executive and legislative functions of the new government. STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 30–33 (2008) [hereinafter CALABRESI & YOO].

In the absence of a separate executive branch, Congress established hundreds of committees to oversee the execution of the law. History soon showed that plural bodies like Congress are poorly suited to exercising executive power. One leading commentator notes that "[i]t is common knowledge that this system failed, and failed lamentably" and that lodging executive power in a plural body rather than a single executive led to "inefficiency and waste." CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY 1775–1789, at 62 (1922) [hereinafter THACH].

Congress's inability to provide supplies for the Continental Army eloquently demonstrated the problems with divided executive authority. George Washington complained bitterly that executive-by-committee reflected a "vital and enherent Principle of

delay incompatible with Military service" and asked that Congress instead place the responsibility for supplying the army in a single Commissary General. 3 THE WRITINGS OF GEORGE WASHINGTON 320, 324 (John C. Fitzpatrick ed., 1931) [hereinafter WRITINGS OF GEORGE WASHINGTON]. Placing executive authority in single officers would promote "Order, Dispatch and Discipline" as well as "a Measure of Oeconomy," in contrast to the "Delay, the Waste, and unpunishable Neglect of Duty arising from these Offices being in commission in several Hands." 3 *id.* at 316, 350; *see also* 5 *id.* at 127, 128; 21 *id.* at 13, 14.

Although the appointment of Joseph Trumbull as Commissary General temporarily improved the procurement of military materials, Congress soon undermined Trumbull by establishing deputy commissaries general who were removable only with congressional consent. 8 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 434–35 (1907). After Trumbull resigned in protest, Congress rejected a resolution that would have given Washington the authority remove commissary officers. 8 *id.* at 620. Trumbull's successor, Jeremiah Wadsworth, refused to take office until Congress passed a resolution recognizing that he had "the full power to appoint and remove every officer in his department." 10 *id.* at 345. *See generally* JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 109–10 (Citizen's Guild of Washington's Boyhood Home 1926) (1804); THAYER 65–67.

Congress attempted to rectify these shortcomings initially by establishing Boards staffed by commissioners who were not members of Congress and later by creating executive departments headed

by single officers. TEACH 62–63; Louis Fisher, *Presidential Tax Discretion and Eighteenth Century Theory*, 23 W. POL. Q. 151, 157–58 (1970). Much of the benefits of these reforms were dissipated by the languor with which Congress's filled these positions. 22 WRITINGS OF GEORGE WASHINGTON 70, 71. And even so, Washington continued to be frustrated by his inability to receive any acknowledgement when he sought guidance or recognition of his authority to proceed. 25 *id.* at 222.

One late-19th century commentator sums up the experience as follows: "It is positively pathetic to follow Congress through its aimless wanderings in search of a system for the satisfactory arrangement of its executive departments." Jay Caesar Guggenheimer, *The Development of the Executive Departments, 1775–1789*, *in* ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 116, 148 (J. Franklin Jameson ed., Boston, Houghton Mifflin 1889). A more modern commentator similarly concludes from this experience "that the power to appoint and remove subordinates is essential to control and responsibility on the part of the real head; . . . and that a legislative body should not concern itself with the details of administration." TEACH 74.

Thus, by the time of the Framing, leading thinkers from across the political spectrum saw the need for a more independent and energetic executive. *See, e.g.*, 4 THE WORKS OF JOHN ADAMS 196 (Books for Libraries Press 1969) (1851); 2 PAPERS OF ALEXANDER HAMILTON 404–05; 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 223 (photo reprint 1970) (1891); 4 THE WRITINGS OF THOMAS JEFFERSON 390,

121-25 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1897) [hereinafter WRITINGS OF THOMAS JEFFERSON]; 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 132 (Max Farrand ed., 1911) [hereinafter FARRAND]; 3 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 260 (Peter Smith 1963) (1926) (Gouverneur Morris).

3. State Constitutions Prior to the Framing

The move toward the centralization of executive authority is also reflected in the state constitutions adopted prior to the Framing. Immediately after the Declaration of Independence, the antipathy toward strong executive power engendered by the despotism of King George III and the royal governors led our earliest post-1776 state constitutions to embrace legislative supremacy as the touchstone of democracy and to ignore the separation of powers. *See* CALABRESI & YOO 30–32. These post-1776 state constitutions further limited executive power by dividing it among more than one person. JACK N. RAKOVE, ORIGINAL MEANINGS 252 (1996).

The thirteen newly independent states soon discovered the dangers of making the executive subordinate to the legislative branch. Thomas Jefferson called vesting all power in the legislature "precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one." 3 THE WRITINGS OF THOMAS JEFFERSON 85, 223; *see also* 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 325–26 (Phila., J.B. Lippincott & Co. 1867) [hereinafter LETTERS OF JAMES MADISON].

In addition to the problems posed by unadulterated legislative supremacy, contemporary commentators bemoaned the problems associated with divided executive authority. Madison regarded the executive branch established in Virginia to be "the worst part of a bad Constitution." Not only was it too subordinate to the legislature: the members of the executive branch were "too numerous and expensive, their organization vague & perplexed" to be effective. 1 *id.* at 179. It was thus no accident that later state constitutions, particularly the New York Constitution of 1777 and the Massachusetts Constitution of 1780, created a state chief executive who was less dependent on the legislature, an arrangement the Framers cited with approval during the Constitutional Convention.

Thus, when the Framers gathered on May 25, 1787, to revise the Articles of Confederation into the Constitution, the general antipathy toward executive power that dominated the period immediately following independence had given way to a consensus in favor of an executive that was more independent and energetic. THACH 51-53; GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 435-37, 471-74, 521, 551-52 (1969).

4. The Constitutional Convention

The issue of the presidential control over the executive branch arose repeatedly during the Constitutional Convention. On June 1, 1787, James Wilson moved that the executive consist of a single person based on his belief that "a single magistrate" would "giv[e] most energy dispatch and responsibility to the office." A plural executive, in contrast, would

lead to "nothing but uncontrouled, continued & violent animosities" that would "interrupt the public administration" and poison politics at all levels. The Convention approved Wilson's motion by a vote of seven states to three, rejecting Edmund Randolph's counterproposal that executive authority be divided among three officials and Elbridge Gerry and Roger Sherman's suggestion that the President be supplemented with an executive council. 1 FARRAND 65–66, 96–97.

Similar proposals by Oliver Ellsworth, Charles Pinckney, and Gouverneur Morris to supplement the President with an executive council were referred to the Committee of Detail. 2 *id.* at 329, 342–44. Although the Committee's initial draft of August 22 included a "privy council" of the type suggested by these proposals, the final version reported on September 4 abandoned any mention of an executive council, substituting language recognizing the president's authority to require written opinions from the principal officers of the executive departments. 2 *id.* at 367, 493. On September 7, the Convention rejected George Mason's attempt to revive the idea of a council of state. 2 *id.* at 538–39, 541–43. As Madison noted, "On the question whether [the executive] should consist of a single person, or a plurality of co-ordinate members, . . . tedious and reiterated discussions took place. The plurality of co-ordinate members had finally but few advocates." 3 *id.* at 132.

C. Arguments from Practice

This Court has also recognized that sustained historical practices "can be treated as a 'gloss on

"Executive Power" vested in the President by §1 of art. II.'" *Medellin v. Texas*, 128 S. Ct. 1346, 1371 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)); *accord Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring). A review of our nation's practices reveals a longstanding tradition recognizing the President's constitutional power to remove.

The question of whether the President had the removal power arose immediately after the commencement of the government in 1789.[5] The initial draft of the bills creating the State Department included language recognizing that the secretary was "to be removable from office by the President of the United States." Representative Egbert Benson was concerned that this language might imply that the power to remove the secretary was conferred by statute rather than by Article II of the Constitution. To forestall this implication, Representative Benson proposed an amendment to delete the above-quoted provision. 1 ANNALS OF CONG. 578–79 (1789).

Benson's proposal touched off one of the most famous debates in congressional history, during which its members offered a variety of constitutional interpretations of the removal power. Madison supported Benson, arguing, "The [removal] question now resolves itself into this. Is the power of displacing, an executive power? I conceive that if any power whatsoever in its nature is executive, it is the

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[5] *See* CALABRESI & YOO 35–36; JAMES HART, THE AMERICAN PRESIDENCY IN ACTION, 1789, at 155–248 (1948); THACH 141–65.

power of appointing, overseeing, and controlling those who execute the laws." *Id.* at 463.

In the end, Benson's amendment carried, making clear that a majority of both houses of the First Congress thought that Article II placed the removal power in the President. *Id.* at 585. Congress similarly amended the framework statutes creating the War Department, *id.* at 592, and the Treasury Department, although the latter amendment engendered considerable conflict between the House and passed the Senate only by the casting vote of Vice President John Adams, *id.* at 55, 71–72, 671, 676, 688–89, 778, 782, 786. *See generally* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1063–67 (2006).

This series of congressional constructions of the Constitution, which came to be known as the "Decision of 1789," was regarded as settling that the Constitution vested the removal power in the President. *See Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986); *Myers v. United States*, 272 U.S. at 174–75; *Parsons v. United States*, 167 U.S. 324, 328–30 (1897); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).[9]

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[9] Even Hamilton, who indicated some ambivalence about presidential removal in *The Federalist No. 77*, regarded the Decision of 1789 as settling the matter. *See* 4 PAPERS OF ALEXANDER HAMILTON 658 n.3 (reprinting the 1804 version of *The Federalist Papers* personally edited by Hamilton, which noted that "it is now settled in practice, that the power of displacing belongs exclusively to the president"). *But see* Seth Barrett Tillman, *The Puzzle of Hamilton's* Federalist *No. 77*, 33 HARV. J.L. & PUB. POL'Y (forthcoming 2010) (available at http://ssrn.com/abstract=1571631) (questioning whether

Presidents George Washington, John Adams, Thomas Jefferson, James Madison, James Monroe, and John Quincy Adams all removed executive officers without incident and without anyone questioning their power to do so. Jefferson in particular removed a number of Federalists simply because they were Federalists, including all of the district attorneys, as U.S. Attorneys were then called. CALABRESI & YOO 42, 61, 68–69, 79–81, 85–86, 92–93.[7] The presidency of Andrew Jackson saw extensive debate over the President's removal power. Jackson made more removals than his six predecessors because of his policy of encouraging rotation in office. *Id.* at 99–101. Jackson also removed Treasury Secretary William Duane as part of his war against the Bank of the United States. Jackson's political foes in the Senate reacted by censuring Jackson for removing Duane. After Jackson took his battle to the country and won the midterm elections, the removal stood, while the censure resolution was formally expunged from the records of the Senate. *Id.* at 108–19.

(continued...)

Federalist No. 77 signals ambivalence about the president's power to remove)

[7] Although some have purported to find early practices to the contrary, see Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 12–78 (1994), the historical record is actually consistent with strong presidential control over the administration, see CALABRESI & YOO 34–38, 43–53, 60–61, 67–68, 88, 103; Calabresi & Prakash, 104 YALE L.J. at 584–85, 626–61.

By this time, the leading constitutional authorities, including those who might have reached a different conclusion if presented with the question as a matter of first impression, universally regarded it as unequivocally settled. *See* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW, lecture 16, at 289–90 (New York, O. Halsted 1826); STORY §§799–800, at 572; 11 REG. DEB. 470 (1835) (statements of Daniel Webster); 4 LETTERS OF JAMES MADISON 368; CALABRESI & YOO 119–22. All presidents from Jackson until the advent of the civil service in the 1880s removed executive officials who did not share their partisan loyalties. *Id.* at 125–26, 131–32, 135, 137–38, 141–42, 145–46, 150–51, 153–54, 157–58, 171–72, 176–77, 199–201, 212–13.

The next serious challenge to the President's removal power did not arise until the 1860s, when Andrew Johnson, a southern Democrat added to the Republican ticket to broaden its appeal, became president following Abraham Lincoln's assassination. Despite his lack of political support, Johnson opposed the Republican Congress's civil rights and Reconstruction policies with nearly reckless abandon. Exasperated by Johnson's stubbornness, Congress passed the Tenure of Office Act, which prevented the President from removing executive officers without senatorial consent. Ch. 151, §§1, 2, 9, 14 Stat. 430, 430, 432 (1867). When Johnson challenged the constitutionality of this law by defying it, he was impeached by the House, only to be acquitted by the Senate in part because senators believed that the Tenure of Office Act was unconstitutional. CALABRESI & YOO 179–87.

Johnson's successors Grant, Hayes, Garfield, Arthur, and Cleveland all attacked the Tenure of Office Act as unconstitutional and contrary to the Decision of 1789. The Act was watered down at the start of Grant's presidency and was finally repealed altogether during Grover Cleveland's first term. *Id.* at 190–92, 203–04, 207–13. Once again, leading commentators recognized that practice settled that the Constitution vested unlimited removal power over executive officials in the President. *Id.* at 215–16.

Between the 1880s and the Supreme Court's 1926 decision in *Myers*, several agencies were created that we today think are independent, including the Interstate Commerce Commission, the Federal Trade Commission (FTC), and the Federal Reserve Board. Strikingly, the governing precedent at the time held that a statute limiting removal to inefficiency, neglect, or malfeasance in office only provided the removed official a right to a hearing without placing any substantive limits on the President's power to remove. *See Shurtleff v. United States*, 189 U.S. 311, 314–16 (1903). Thus, none of these agencies was properly considered independent. CALABRESI & YOO 213–14, 233–35, 257–60, 262, 267–69, 299–300, 423–21.

Civil service laws were also passed during this period to provide for merit appointment of federal administrative officials, but contrary to the popular wisdom, did not include any limits on presidential power to remove. *Id.* at 207–08, 220–21, 300, 422–23. In 1926, the Supreme Court issued *Myers*, its most important removal decision ever, affirming that the

Constitution gives the President the removal power. *Id.* at 267–69, 299–300, 423–24.

Nine years later, during the tumultuous presidency of Franklin D. Roosevelt, the Supreme Court unexpectedly created an exception to *Myers* in the famous case *Humphrey's Executor v. United States*, which arose after FDR removed the head of the FTC. *Shurtleff* established that FDR had the statutory authority to remove Humphrey, while *Myers* recognized that he had the constitutional authority as well. Nonetheless, consistent with its practice prior to the "switch in time that saved nine," the Court opposed FDR by holding that removal limits were constitutional for so-called independent agencies that exercised quasi-legislative and quasi-judicial functions. 295 U.S. 602, 621, 628–29 (1935). FDR denounced *Humphrey's Executor* as wrongly decided, and he unsuccessfully sought legislation to overrule it, as did many of his successors. CALABRESI & YOO 284–88, 300, 425. *Humphrey's Executor* was ultimately scrapped by *Morrison*, which established the current test for evaluating limits on the removal power. 487 U.S. at 680–90.

Morrison upheld the constitutionality of the Ethics in Government Act, which provided for a set of court-appointed independent counsels, who were removable only for cause, to investigate and prosecute high-level wrongdoing in the executive branch. *Id.* at 691–96. The period between *Morrison* and the expiration of the Ethics in Government Act in 1999 provided the nation with a painful lesson in the abuses that can occur when the President lacks the tools needed to oversee the execution of federal law. President George H.W. Bush had to share the

power to oversee the prosecution of the law with Iran Contra special prosecutor Lawrence Walsh, while President Bill Clinton had to share the same power with special prosecutor Kenneth Starr. The widespread dissatisfaction with this situation caused political support for the Ethics in Government Act to evaporate. When the statute came up for renewal in 1999, Congress allowed it to sunset out of existence. CALABRESI & YOO 390, 400–04, 426–27. The rise and fall of the Ethics in Government Act, like the rise and fall of the Tenure of Office Act, thus marked a reaffirmation of the previous 220 years of practice recognizing that the removal power is vested in the President. Indeed, the history shows that the overwhelming majority of our Presidents have defended and asserted unlimited presidential removal powers.

D. Policy Arguments

The textual and historical arguments supporting the President's constitutional power to remove are also supported by policy considerations.[8] First, ensuring that the President can exercise control over the entire executive branch promotes energy in the executive, a quality widely regarded as essential to good government. *See also Clinton* v. *Jones*, 520 U.S. at 712 (Breyer, J., concurring) (noting how placing the all executive authority "in the hands of a single, constitutionally indispensable, individual"

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[8] *See generally* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 37–55 (1995); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–46 (2001).

"encourage[s] energetic, vigorous, decisive, and speedy execution of the laws"); KENT 253–54 (concluding that the virtues of "promptitude, decision, and force" are "most likely to exist when the executive authority is limited to a single person, moving by the unity of a single will"); THE FEDERALIST No. 70, at 471 (Jacob E. Cooke ed., 1961).

Second, giving the President responsibility for all aspects of executing federal law enhances political accountability by making clear precisely who is responsible for the executive branch's performance. *Clinton v. Jones*, 520 U.S. at 712 (Breyer, J., concurring) (noting how "consciously deciding to vest Executive authority in one person rather than several" tends to "focus, rather than to spread, Executive responsibility thereby facilitating accountability"); KENT 254 ("Unity increases not only the efficacy, but the responsibility of the executive power. Every act can be immediately traced and brought home to the proper agent."); THE FEDERALIST No. 70, at 475–79 (observing that dividing executive authority "tends to conceal faults, and destroy responsibility"). Moreover, dividing executive authority increases information costs, which inevitably decreases the public's ability to hold executive officials accountable. The existence of multiple executive entities also increases bargaining costs and can create debilitating collective action problems. Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1705–12, 1717–21, 1730–33 (2009).

Finally, the more executive branch officials become independent of the President, the more they

fall under the control of congressional committees. Such committees are dominated by Chairs who are responsive to the needs of a small congressional district or a single state and thus are more likely to be influenced by special interests than the President, who represents a diffuse national majority and is necessarily harder to capture. *See* Calabresi, 48 ARK. L. REV. at 51–55.

Thus, permitting Congress to place limits on the President's removal power threatens to upset the Madisonian conception of the separation of powers, which envisions all three branches constantly engaged in a state of dynamic tension. THE FEDERALIST NO. 51 (James Madison). By reducing the President's role in this balance, limitations on the removal power inevitably tip the balance in Congress's favor. In fact, this Court recognized the dangers of changing the balance of constitutional powers in *Clinton v. City of New York*, in which Congress attempted to delegate to the President the unilateral authority to rewrite appropriations statutes. This Court invalidated the attempt because such a change would have removed one branch from the multibranch interaction envisioned by the Constitution. 524 U.S. 417, 439–40 (1988). Even though Congress was voluntarily surrendering its own power and acted out of the laudable desire to eliminate pork barrel politics and reduce government spending, the change would still have taken that branch out of the process of the dynamic tension that the Framers regarded as the best safeguard for liberty. Although the Court declined to address whether the structural change effected by the line-item veto "impermissibly disrupts the balance of

powers among the three branches of government." *id.* at 447–48 (internal quotation marks omitted). Justice Kennedy's concurrence explicitly warned of the dangers of allowing the branches to readjust the balance of power and reminded us that constitutional values must be more enduring. *id.* at 449–52 (Kennedy, J., concurring). Continuing to sanction congressionally imposed limits on the President's removal power would create precisely the same dangers.

E. Why *Morrison v. Olson* Must Be Overruled

As this Court has often noted, the mere fact that a precedent was incorrectly decided is insufficient basis to justify overruling it. Stare decisis is generally the preferred course because "in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

The Court has identified considerations that justify overruling a precedent. For example, this Court has long exhibited greater willingness to reconsider its constitutional precedents, because "correction through legislative action is practically impossible." *Id.* at 407. Thus, the fact that *Morrison* addressed a constitutional issue means that, under this Court's precedents, stare decisis applies with lesser force.

In addition, this Court has more readily overruled precedents that have proven unworkable, such as when a balancing test is so amorphous as to defy predictable application. *See Crawford v. Washington*, 541 U.S. 36, 63 (2004). The test for

limits on presidential removal power set forth in *Morrison* represents precisely the type of standardless balancing test incapable of principled implementation that this Court has overturned in the past.

Indeed, ad hoc balancing is particularly dangerous in the context of the Constitution's structural protections, because such an approach "pits an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case." *CFTC v. Schor*, 478 U.S. 833, 863 (1986) (Brennan, J., dissenting). As Justice Kennedy has noted, "The Constitution's structure requires a stability which transcends the convenience of the moment." *Clinton v. City of New York*, 524 U.S. at 449 (Kennedy, J., concurring). It is for this reason that this Court has consistently rejected calls to allow political exigencies to justify overriding the structural protections embodied in the Constitution. *See id.* at 447; *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 276–77 (1991); *Bowsher v. Synar*, 478 U.S. at 736; *INS v. Chadha*, 462 U.S. 919, 944–46 (1983); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73 (1982); *Pub. Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring); *see also Printz v. United States*, 521 U.S. 898, 932–33 (1997) (drawing a parallel conclusion in the context of federalism); *New York v. United States*, 505 U.S. 144, 187 (1992) (same).[9]

[9] Although some have suggested that balancing tests are only problematic in separation of powers disputes involving explicit

In addition, this Court has long embraced Justice Brandeis's recognition that precedents should also be overruled when the underlying facts have changed or when the previous decision reflect "views as to economic or social policy which have since been abandoned." *Burnet*, 285 U.S. at 412 (Brandeis, J., concurring). The nation's history following *Morrison* eloquently demonstrates just how much our fundamental beliefs and commitments about the optimal governmental structure have changed. The manner in which independent counsels were able to impair the presidencies of George H.W. Bush and Bill Clinton created such a backlash that the Ethics in Government Act was allowed to expire without reauthorization in 1999.

Thus, just as *Myers* recognized in 1926 that the previously repealed Tenure of Office Act was unconstitutional, so should this Court recognize that *Morrison*'s decision to uphold the constitutionality of the Ethics in Government Act is inconsistent with the text of the Constitution, the original meaning of the Constitution's Framers, the practice of the last 220 years, and with good public policy. *Morrison* should now be overruled.

(continued...)

constitutional provisions, *see Pub. Citizen*, 491 U.S. at 486 (Kennedy, J., concurring), the fact that the removal power is a nontextual, implied executive power has not stopped this Court from protecting it against legislative incursions. *Bowsher*, 478 U.S. at 723–32. The fact that the Court has cited precedents from the context of the nontextual removal power as a basis for invalidating legislative incursion into the president's textual appointment power, *see Buckley*, 424 U.S. at 135–36, counsels against such a distinction.

II. THE APPOINTMENT POWER

All parties in this case concede that the members of the PCAOB exercise "significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126, and are therefore "Officers of the United States" who must be appointed in conformance with the Constitution's Appointments Clause. The Appointments Clause specifies that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, §2, cl. 2. Under the terms of the Sarbanes-Oxley Act, the members of the PCAOB are appointed by the Securities and Exchange Commission (SEC). 15 U.S.C. §7211(e)(4). This mode of appointment, which involves neither the President nor the Senate, is permissible *only* if the members of the PCAOB are "inferior Officers" within the meaning of the Appointments Clause.[10]

[10] Even if the members of the PCAOB are inferior officers, their appointments are invalid if the SEC, as a collective body, cannot serve as a "Head[] of Department[]" under the Appointments Clause. Without downplaying the seriousness of this question

The Constitution does not directly define who counts as an "inferior Officer." Nor has the Court set forth a mechanistic test for establishing an officer's status as principal or inferior. *See Edmond v. United States*, 520 U.S. 651, 660 (1997) ("Our cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointment Clause purposes.").

In *Edmond*, the Court emphasized the hierarchical position of an officer within the executive department, explaining that "[g]enerally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President," *id.* at 662, and concluding that "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *id.* at 663.

In *Morrison*, the Court looked at a range of factors involving the officer's duties, jurisdiction, term of office, and removability in deciding that the special prosecutor was an inferior officer. 487 U.S. at 671-72.

The members of PCAOB are clearly principal officers under either approach. First, many functions

(continued...)

we do not address it here because we think it clear that the members of the PCAOB are principal rather than inferior officers. For the same reasons, we do not discuss whether the various restrictions on the qualifications of the members of the PCAOB (*see* 15 U.S.C. §7211(e)(1), (e)(2), (e)(6)) unconstitutionally constrain the power of the appropriate appointing authorities.

of the PCAOB, including the specific functions at issue in this case, are not subject to appropriate control and direction by other principal officers. Second, apart from the lack of control and supervision by superiors, the sheer scope of the responsibilities of the PCAOB mandates that its members be considered principal officers.

A. *Edmond*'s Hierarchy Test

The standard, and therefore presumptive, 18th-century meaning of the term "inferior" describes a hierarchical relationship. The leading 18th-century dictionary defined "inferiour" as "1. Lower in place. 2. Lower in station or rank of life. 3. Lower in value or excellence. 4. Subordinate." JOHNSON. This is consistent with the Latin root "inferus," which means "below or beneath." BARNHART DICTIONARY 1095. Given the prevalence of knowledge of Latin among the educated members of the founding generation,[11] a reasonable reader of the Constitution would construe the Appointments Clause to require an inferior officer to be subordinate to some other officer.

This conclusion is reinforced by the Constitution's other explicit and implicit uses of the term "inferior." The Appointments Clause distinguishes inferior from (without using the term) principal officers, and the Article III Vesting Clause distinguishes the "supreme Court" from "inferior Courts." U.S. CONST. art. III, §1; *see also id.* art. I, §8, cl. 9 (giving Congress power "to constitute Tribunals inferior to the supreme

[11] *See* Robert G. Natelson, *Federal Land Retention and the Constitution's Property Clause: The Original Understanding*, 76 U. COLO. L. REV. 327, 334 n.28 (2005).

Court"). Lower federal courts are "inferior" to the Supreme Court because they are subject to the supervision and direction of the Supreme Court. If lower courts could decide cases free from Supreme Court supervision, they would be "coordinate" rather than "inferior" courts. In sum, the Constitution primarily uses terms like "inferior" and "supreme" to describe hierarchical relationships.

In the context of Article II, if an officer is not subject to control and supervision by a superior officer, the officer cannot be an inferior officer. The Court in *Edmond* was exactly right that inferior officers "are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." 520 U.S. at 663. No other conclusion accounts for the primarily hierarchical meaning of the term "inferior."

We do not understand anyone in this case to challenge the crucial role of hierarchy in determining inferior officer status (nor could they do so without directly challenging *Edmond*). The dispute, rather, is about whether the PCAOB members are in fact adequately supervised and directed by principal officers. The D.C. Circuit in this case described the SEC's authority over the PCAOB as "explicit and comprehensive" and "extraordinary." Pet. App. 7a. There is no doubt that the SEC has a considerable measure of ultimate control over many of the PCAOB's functions. As the D.C. Circuit noted:

> the Commission approves all Board rules, 15 U.S.C. §§7211(g), 7217(b)(2), and may abrogate, delete, or add to them, *id.*

> §7217(b)(5). All Board sanctions are subject to plenary review by the Commission, *id.* §7217(c)(2); and the Commission "may enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board." *id.* §7217(c)(3) . . . . The Commission both appoints and removes Board members. *id.* §§7211(e)(4)(A), (e)(6). It also may impose limitations upon Board activities, *id.* §7217(d)(2), and relieve the Board of its enforcement authority altogether. *id.* §7217(d)(1).

Pet. App. 12a–13a. All of this is true, but it does not yield the conclusion that PCAOB members are inferior officers. The SEC has the power to review the PCAOB's rules and sanctions, but it has no specific statutory power to direct, supervise, or review the PCAOB's investigative and enforcement decisions, which are precisely the decisions of the PCAOB to which petitioners have been subjected. The ability to review *subsequent* actions, such as reports, sanctions, or rules, that *result* from investigative and enforcement actions simply is not the power to supervise and direct *the investigative and enforcement actions themselves* just as (to borrow an example from Judge Kavanaugh) a federal court's ability to review the *results* of a U.S. Attorney's investigative and prosecutorial efforts is not the power to supervise the investigative and prosecutorial activities themselves. Pet. App. 92a. To be sure, if the SEC could remove at will the members of the PCAOB, that plenary removal power might suffice to give the SEC adequate supervisory

power over all aspects of the PCAOB's work. But the SEC may only remove a PCAOB member "for good cause shown before the expiration of the term of that member." 15 U.S.C. §7211(e)(6); *see also id.* §7217(d)(3) (narrowly limiting the grounds for removal for cause). Accordingly, in the absence of at-will removal power, the SEC's supervisory authority must come from more specific statutory provisions, and with respect to the investigative and enforcement decisions illustrated by this case, there are none.

A principal officer does not become inferior simply by being given additional authority over which other officers exercise control. The Attorney General is clearly a principal officer, with considerable authority that is subject to control and direction only by the President and by no other principal officer. If Congress gave the Attorney General statutory decisionmaking power over all functions now entrusted to the various Cabinet agencies, but subject to the direct control and direction of the heads of those agencies, it would not turn the Attorney General into an inferior officer simply because he or she now had considerable authority subject to the control and direction of other officers. The key consideration in determining principal officer status is not the percentage or amount of an officer's authority that is subject to the control or direction of some other officer, but the significance of the authority that is not so subject. Similarly, even if many of the functions of the PCAOB are subject to the control and direction of other officers, the PCAOB members are still principal rather than inferior officers so long as there are significant functions for

which no such supervision and direction is provided—and the PCAOB's investigative, examining, and enforcement functions are not controlled and supervised by the SEC.

B. *Morrison*'s Scope-of-Responsibility Test

An officer who is not subject to the control and direction of a principal officer is of necessity a principal officer. But an officer who *is* subject to such control and direction can nonetheless be a principal officer if the officer's responsibilities are sufficiently broad. Those responsibilities might either make the officer a "Head[] of [a] Department[]" or directly preclude categorization as inferior. In either case, such an officer must be appointed by the President with the advice and consent of the Senate. Such is clearly the case with the members of the PCAOB.

The Appointments Clause permits appointment of inferior officers by the President, the courts of law, or the heads of departments. The natural inference from this enumeration is that all courts of law and heads of departments must be principal officers. *See* Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1019 (2007). The conclusion that heads of departments are principal officers is confirmed by the 18th-century dictionary definition of "head" as "Chief; principal person; one to whom the rest are subordinate; leader; commander." JOHNSON. If someone is the head of a department, he or she must be appointed by the President with the advice and consent of the Senate.

A "department" is a "separate allotment: province or business assigned to a particular person." JOHNSON; *see also* 1 NOAH WEBSTER, AMERICAN DICTIONARY 58 (New York, S. Converse 1828) (defining a department as a "separate allotment or part of business: a distinct province, in which a class of duties are allotted to a particular person"); *Freytag v. Comm'r*, 501 U.S. 868, 920 (1991) (Scalia, J., concurring) (noting that "the Founders . . . chose the word 'Departmen[t],' . . . not to connote size or function (much less Cabinet status), but separate organization"). An executive department is thus any unit that has a significant degree of organizational identity and responsibility. Anyone at the apex of such an organization is a department head and therefore a principal officer who must be appointed by the President with the advice and consent of the Senate.

Nothing in the 18th-century definition of a "department" makes reference to a hierarchical relationship between a department and other institutions. A federal entity can be a constitutional "department" even if it is part of a larger organizational unit just as an entity can be an "agency" under the Administrative Procedure Act "whether or not it is within or subject to review by another agency." 5 U.S.C. §551(1). An entity must have a certain degree and kind of identity and authority in order to qualify as a constitutional "department" and thus require its head to be appointed by the President with Senate advice and consent. The questions are: what degree and what kind?

The path to an answer is disclosed by founding era usage of the term "inferior." We have already seen that the primary meaning of "inferior," both in general and in the specific context of Article II, involves a hierarchical relationship of subordination and control. That is not, however, the only way in which the term "inferior" was used during the founding era—and in particular not the only way in which it was used in connection with governmental authority.

In the late 18th century, a court whose decisions were not subject to review by any other court could nonetheless sometimes be called an "inferior court" if its jurisdiction or geographic scope was limited in some important respect. Indeed, a number of states during the founding era had nonhierarchical court systems, in which the label "supreme" did not necessarily connote ultimate decisional authority and the label "inferior" did not necessarily connote decisional subordination, but instead described scope of authority. *See* David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457, 466-72 (1991). An early draft of Article III proposed creating "one or more supreme tribunals." 1 FARRAND 21, which makes sense only if "supreme," and therefore "inferior," can sometimes have a nonhierarchical meaning.

Several of this brief's authors have argued at great length that, notwithstanding these founding-era usages, the best understanding of Article III is that the Supreme Court must be supreme in the hierarchical sense and therefore must have final decisional authority on all matters within the jurisdiction of the federal courts. *See* Calabresi &

Lawson, 107 COLUM. L. REV. at 1016–25. For present purposes, the important point is not to resolve that question, but to emphasize the fact that the term "inferior," in the context of governmental organization, has two dimensions: one focused on decisional and operational subordination and the other focused on scope of jurisdiction or authority. Given both the primary meaning of "inferior" and the structural and contextual features of the Constitution, hierarchy is a necessary element of any inquiry into constitutional inferiority: an officer who is not subordinate is not inferior. But given the alternative account of inferiority prevalent in the founding era, it is also evident that an officer whose powers and jurisdiction are not comparatively lesser or limited is not inferior.

The same considerations play into the determination whether an executive unit is a "department." It is a necessary but not sufficient condition for departmental status that a governmental unit have an organizational identity. Units with organizational identity and decisional autonomy are clearly departments. Units with organizational identity, without decisional autonomy, but with powers that cannot be dismissed as lesser or lower are departments as well. And the head of any such unit is a head of department under the Appointments Clause and therefore a principal officer.

The PCAOB is important enough to be considered a department. The PCAOB's organizational identity is more than established by its authority to appear in court with its own counsel, 15 U.S.C. §7211(f)(1), to conduct operations in any state, *id.* §7211(f)(2), to

appoint employees, *id.* §7211(f)(1), to enter into contracts, *id.* §7211(f)(6), and (perhaps most tellingly) "to allocate, assess, and collect accounting support fees established pursuant to section 109, for the Board, and other fees and charges imposed under this title." *id.* §7211(f)(5). The PCAOB's powers are broad enough in scope to make it a constitutional "Department[]." All public auditors must register with and provide information to the PCAOB, *id.* §7212(a) (d), and the PCAOB "shall assess and collect a registration fee and an annual fee from each registered public accounting firm, in amounts that are sufficient to recover the costs of processing and reviewing applications and annual reports." *Id.* §7212(f). *See also id.* §7219(d)–(g) (describing the PCAOB's authority to impose, allocate, and collect fees). The PCAOB has authority to promulgate rules establishing "such auditing and related attestation standards, such quality control standards, and such ethics standards to be used by registered public accounting firms in the preparation and issuance of audit reports, as required by this Act or the rules of the Commission, or as may be necessary or appropriate in the public interest or for the protection of investors." *Id.* §7213(a)(1).

The PCAOB, in other words, has authority to regulate virtually every aspect of the public auditing process. The PCAOB is further empowered to inspect, investigate, and discipline all registered public accounting firms. *Id.* §§7214–15. The power to discipline includes the power to impose substantial civil fines. *Id.* §7215(c)(4)(D). These powers extend to the entirety of the public auditing process, throughout the country and across all businesses,

For purposes of determining whether the PCAOB is a "Department[]," it does not matter whether any of these powers is subject to review by another authority. The powers themselves are sufficiently extensive in substantive and geographical scope to mandate classifying the PCAOB as a department. Accordingly, the head of the PCAOB (whether that be the Chairperson or the entire PCAOB we do not say) is the department head and necessarily a principal officer.

Alternatively, one could simply say that PCAOB members exercise sufficient authority pursuant to the laws of the United States so that they are not merely officers but principal officers. Either formulation is supported by the same considerations.

The Court was thus correct in *Morrison* to examine the scope of the special counsel's authority and jurisdiction. The Court held that the special counsel was an inferior officer in light of the fact that the special counsel had strictly limited jurisdiction, a limited temporal existence, and authority over a very narrow range of cases (however sweeping that authority might have been within its compass). 487 U.S. at 671-72. The PCAOB, by contrast, is a continuing body with broad jurisdiction over all public companies and the entire accounting profession. There is nothing geographically, temporally, or jurisdictionally limited about the PCAOB's responsibilities. Accordingly, the members of the PCAOB must be considered principal officers, and their appointments under the Sarbanes-Oxley Act were therefore unlawful.

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be reversed.

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APPENDIX

APPENDIX

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

FREE ENTERPRISE FUND *ET AL.*, PETITIONERS

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CATO INSTITUTE AND PROFESSORS LARRY RIBSTEIN AND HENRY BUTLER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Constitution requires that the Public Company Accounting Oversight Board—which enjoys a broad mandate to regulate the accounting industry, and the full panoply of taxing, spending, rulemaking, and criminal enforcement powers needed to carry out that mandate—be accountable to the President.

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INTRODUCTION*

The separation of powers lies "at the heart" of the governmental structure created by the Constitution. *Buckley* v. *Valeo*, 424 U.S. 1, 119 (1976). And in separating the powers of the federal government's three branches, "[t]he Founders * * * consciously decide[ed] to vest Executive authority in one person rather than several." *Clinton* v. *Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in judgment).

This constitutional design was not only a part of the Framers' original understanding; it was a wise way to facilitate both coordinated law enforcement and government that is accountable and responsive to the people. "The Framers recognized * * * [that] structural protections against abuse of power [are] critical to preserving liberty." *Bowsher* v. *Synar*, 478 U.S. 714, 730 (1986). And presidential control over the use of executive power by federal agencies is indispensable to the good government that is liberty's everyday safeguard. In short, "[w]hen structure fails, liberty is always in peril." *Public Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in judgment). It has failed here.

Indeed, the Public Company Accounting Oversight Board ("PCAOB" or "Board") of the Sarbanes-Oxley Act of 2002—passed with little scrutiny amidst a panic—is a story of government failure on two levels:

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* The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

First, the Board's structure creates unusually dangerous incentives virtually certain to make it dysfunctional. Indeed, the Board's unprecedented power, together with its novel insulation from presidential control, encourage institutional aggrandizement more than in any previous agency. Historically, the power to remove an official "for cause" was seen as "an impediment to, not an effective grant of, Presidential control." *Morrison* v. *Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting). But at least traditional independent agencies are subject to this control. That much is settled. Here, the Board is protected from Presidential control by *two* layers of "for cause" removal statutes—rendering removal effectively impossible. Truly, "[t]his wolf comes as a wolf." *Id.* at 699.

Second, and inevitably, these failures in institutional design have generated failed policy results. In particular, the Board's lack of connection to the "nerve center" of law enforcement—the Executive—has caused the Board to regulate without coordinating with other agencies. This clumsiness, in turn, has caused the Board to trigger threats of retaliatory regulation by foreign countries—creating just the kind of confusion Congress could have avoided by placing the Board under the President, who speaks with one voice for the United States in foreign affairs. Likewise, the Board's lack of coordination with other agencies is subjecting regulated parties to a host of duplicative regulations—here again, a result wholly unnecessary given the Constitution's sensible requirement of accountability to the Executive.

INTEREST OF THE *AMICI CURIAE*

The Cato Institute believes that sound public policy requires, as the Framers understood, a limited

federal government composed of properly divided branches. Cato was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, publishes the annual Cato Supreme Court Review, and files *amicus* briefs with the courts. This case is of central concern to Cato because it implicates the core constitutional structure—the separation of powers—that secures our liberty.

Professors Larry Ribstein and Henry Butler have devoted a substantial part of their professional careers to studying the federal securities laws, including how those laws should be drafted, interpreted, and enforced to ensure protection of investors and promotion of efficiency, competition, and capital formation. Professor Ribstein, an author of multiple treatises on corporate law, holds the Mildred Van Voorhis Jones Chair in Law at the University of Illinois College of Law. Professor Butler, a noted law-and-economics scholar, is a Senior Lecturer at Northwestern University Law School and Executive Director of the Searle Center on Law, Regulation, and Economic Growth.

STATEMENT OF THE CASE

Sarbanes-Oxley was passed in record time under massive public pressure. With the accounting scandals of Enron and WorldCom just behind and midterm elections just ahead, considered opposition to

the bill all but disappeared. "House GOP Opposition to Senate's Accounting Bill Vanishes," *Congress Daily* declared. See Pamela Barnett, 2002 WLNR 11741925 (July 18, 2002). Even in this environment, it is striking that the House's name-sponsor of Sarbanes-Oxley, House Financial Affairs Committee Chairman Michael Oxley, would declare, just twelve days before Sarbanes-Oxley was signed into law, that the "governmental powers" being given to the Board would be "extraordinary *and maybe even beyond constitutional*." *Ibid.* (emphasis added).

Chairman Oxley was right. And as we explain below, the constitutional failures in his bill have produced predictably bad policy results. To understand why this is so, however, it is helpful to understand the process that led to the Board's creation and the nature of the authority conferred on the Board.

A. The Board's origin in a panicked legislative environment

Although the accounting profession had not previously been subject to day-to-day federal regulation, Congress abruptly changed course in 2002.[1] It created a new agency with sweeping federal power to

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[1] See Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 983-95 (2005) (describing tradition of self-regulation). Although the SEC had formal power to regulate accounting methods used to prepare and audit financial statements included in reports mandated by that agency, the SEC had for nearly a century adopted a "policy of looking to the private sector for leadership in establishing and approving accounting principles." *Statement of Policy on the Establishment and Improvement of Accounting Principles and Standards*, 39 Fed. Reg. 1260 (Jan. 7, 1974).

"audit the auditors," and it required all accounting firms that prepare or issue audit reports on American public companies to register with the Board. 15 U.S.C. § 7212(a).[2] Yet this fundamental shift in regulation of the accounting industry was as hasty as it was significant. Indeed, as many scholars have observed,[3] it was "an exemplar of low-quality legislative decisionmaking." Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1544 (2005).[4]

Sarbanes-Oxley was enacted as a piece of emergency legislation prompted by a feeling of crisis. As the long bull market of the 1990s began to decline, Enron's spectacular and well-publicized demise shocked the stock market. A drumbeat of revelations involving fraud at other corporations soon followed, and all of this accompanied a stock market crash fu-

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[2] As of July 23, 2009, 2,083 firms had registered. See *Registered Public Accounting Firms As of July 23, 2009* (available at: http://www.pcaob.org/Registration/Registered_Firms.pdf).

[3] See, e.g., Larry E. Ribstein, *Sarbox: The Road to Nirvana*, 2004 MICH. ST. L. REV. 279 (2004); Robert Charles Clark, *Corporate Governance Changes in the Wake of the Sarbanes-Oxley Act: A Morality Tale for Policymakers Too*, 22 GA. ST. U. L. REV. 251 (2005); HENRY N. BUTLER & LARRY E. RIBSTEIN, THE SARBANES-OXLEY DEBACLE: WHAT WE'VE LEARNED; HOW TO FIX IT (2006).

[4] Sarbanes-Oxley also fundamentally altered the regulation of internal corporate governance—nationalizing a swath of regulation that had long been the province of state law. Corporate activity that was previously regulated by the state-law duty of care (and the business judgment rule) became subject to requirements enforced by the Board, such as those involving internal controls reporting. See Romano, *Quack Corporate Governance*, at 1523.

eled by investor panic. See Romano, *Quack Corporate Governance*, at 1544-1549.

The panicked atmosphere on Wall Street caused a similar panic in the halls of Congress, with overwhelming pressure to do something—anything—to "restore investor confidence." The process in Congress was notable for the speed with which it occurred—and for the attendant lack of careful deliberation. In both houses, the legislation was considered within an unusually narrow time frame. The House took only one day, for example, to consider the Financial Services Committee's bill; and the Senate debate, which lasted only a week, occurred under a cloture motion, which restricted the time for legislative consideration and amendment. See *id.* at 1549.

In a rush to act as quickly as possible, members of Congress reached for off-the-shelf policy proposals. And the interest group best positioned with such proposals ready at hand was a group of "policy entrepreneurs," composed mainly of former government officials and led by former SEC Chairman Arthur Levitt. *Id.* at 1549, 1568-1571. Levitt had failed to enact his policy agenda less than two years earlier, due to bipartisan congressional opposition. *Id.* at 1549-1550. But this time, government officials associated with the SEC—some of whom would later be positioned to influence the PCAOB's priorities—dominated the process. See *id.* at 1569 (showing that current and former government officials, usually associated with the SEC, testified more often during committee hearings than any other group).

Although legislators listened to many of these government officials, what they most glaringly did not consult was the overwhelming body of empirical re-

search that contradicted what was being proposed. As Professor Roberta Romano has documented in her review of nearly fifty empirical studies in the corporate finance and accounting literature, the studies were virtually unanimous in their findings that many of Sarbanes-Oxley's substantive corporate governance mandates would not benefit investors. See *id.* at 1529-1543.

B. The Board's unprecedented insulation from presidential oversight

In a rushed legislative atmosphere heedless of empirical evidence and dominated by government officials, it is hardly surprising that one result of this process was a perch for more government officials. More surprising, however, is the unprecedented nature of the Board that Congress hastily created.

The Board's powers are sweeping. Its duties include establishing professional audit standards, inspecting the engagements of registered accounting firms, and, as necessary, investigating and bringing enforcement actions against those firms 15 U.S.C. §§ 7211(c), 7214(a), 7215(c)(4). The Board also has a broad mandate to make law, including whatever rules and standards "may be necessary or appropriate in the public interest or for the protection of investors." *Id.* § 7213(a)(1). Violations are punishable as crimes (*id.* §§ 78ff(a), 7202(b)), and the Board has power to impose sanctions "as it determines appropriate" (*id.* §§ 7215(b)(1), (c)(4)). The Board also has power to levy its own taxes on publicly traded companies and to appropriate that money however it wishes by setting its own budget. *Id.* § 7219(b)-(d).

The most remarkable feature of the Act, however, is the lack of accountability to accompany the Board's

breathtaking authority. The President does not oversee the Board in any respect—whether through removal or otherwise. To the contrary, the Board is deliberately insulated from his control by a double "for cause" removal structure whereby the Board (itself an independent agency) is answerable only to *another* independent agency, the SEC. The SEC's commissioners can remove the PCAOB's board members, but only for "cause," narrowly defined. *Id.* §§ 7211(e)(6) & 7212(d)(3). And the SEC's commissioners, in turn, are likewise appointed for fixed terms and removable only for cause. 15 U.S.C. § 78d(a); Pet. App. 5a.

By layering one "for cause" removal requirement upon another, Congress made the presidential power of removal exponentially more limited for the Board than for an ordinary independent agency. For the President to remove a PCAOB official, he would need not only cause to remove the official, but also cause to remove the SEC commissioners for refusing to remove the official. In practice, this is no power at all.

It is therefore unsurprising that the Board would describe itself as a "*private-sector*, non-profit corporation."[5] Indeed, in its degree of insulation from presidential oversight and control, the Board is alone among all other agencies, past or present. Pet. App. 42a, 43a (Kavanaugh, J., dissenting) (noting the "world of difference between the legion of [independ-

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[5] See www.pcaob.org ("[t]he PCAOB is a private-sector, non-profit corporation") (PCAOB homepage) (visited July 30, 2009) (emphasis added); 15 U.S.C. § 7211(a), (b) ("the Board shall be a body corporate"; "the Board shall not be an agency or establishment of the United States government"). The parties have agreed, however, that the Board is a governmental entity for constitutional purposes. Pet. App. 112A; Pet. 7 n.1.

ent] agencies and the PCAOB" and describing the latter as a structure seen "never before in American history"). Congress's decision to strip the President of all appointment and removal power was quite deliberate: It aimed to give the Board "unchecked power, by design." 148 Cong. Rec. S6327-06, S6334 (daily ed. July 8, 2002) (statement of Sen. Gramm). For regulated accountants, the Board amounts to nearly a whole government in microcosm—an agency that is at once the lawmaker, the tax collector, the inspector, the sheriff, the prosecutor, the judge, and the jury—yet without the political accountability that normally constrains even independent agencies.

SUMMARY OF ARGUMENT

In its haste to enact Sarbanes-Oxley, Congress created a regulatory institution never before seen in American history: the PCAOB, an independent agency shielded beneath another independent agency—and thus entirely unaccountable to the President, who is constitutionally charged to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. At the same time, Congress matched this unprecedented unaccountability with an equally unprecedented amount of power: a new mandate to regulate the accounting industry, and a full panoply of taxing, spending, rulemaking, and criminal enforcement powers with which to carry out that mandate.

Not only is the resulting agency unconstitutional, but, as demonstrated below, it is also a policy failure. There is no tension here between good government and constitutional government. Not coincidentally, the Board threatens both.

As we explain in Part I, the Board's uniquely unaccountable structure creates incentives that are inherently inconsistent with good government. Because the President has no power to oversee the Board's budget, hold it accountable to the public, or coordinate its actions with other executive branch activities, the Board is a policy failure in design.

Inevitably, and as we explain in Part II, that failure in design has caused failures in practice. The Board's built-in incentives are beginning to create significant policy problems that cannot be remedied by the President. Although it is imperative that the Nation speak with one voice—the President's voice—in foreign affairs, the Board imposes American accounting standards abroad. These actions, which have bloated the Board's budget, have caused numerous international complications and invited retaliation by foreign regulators. Additionally, on the home front, the Board has imposed massive costs on American businesses—many owing to a lack of coordination with other Executive Branch agencies that is quite expected from an agency not subject to the faintest hint of control by the President.

ARGUMENT

As Judge Kavanaugh noted in his dissent below, "even assuming that the [PCAOB] is an effective means to regulate the accounting industry, that a given law or procedure is efficient, convenient, and useful * * * will not save it if it is contrary to the Constitution." Pet. App. 103a (Kavanaugh, J., dissenting) (citation omitted). Unfortunately, the Board is *not* an efficient, convenient, or ultimately useful means of regulating the accounting industry. Good government requires that institutions with the right

incentives wield power responsibly and in a manner that serves the public interest. And the Board's unprecedented degree of power, together with its near-total exemption from presidential oversight, not only renders it unconstitutional, but creates incentives that cannot yield sound policy results.

I. The President's Inability To Control The Board Creates Incentives Virtually Certain To Aggrandize Parochial Interests At The Expense Of The Public Interest.

The Board's uniquely unaccountable structure is not simply a formal or technical violation of the Constitution's required separation of powers. Rather, the Board's structure makes it highly likely to be a policy failure. This conclusion is confirmed by lessons drawn from the established political science and public choice literature on institutional design. Despite good intentions in its creation, the Board suffers from incentives that inevitably impede good government. The trouble is twofold.

First, as scholars have amply demonstrated, agencies have a natural tendency to aggrandize their own institutional interests—and thus to stray from the broader public interest. Most commonly, this tendency manifests itself in an agency's inherent incentive to maximize its own budget. See generally WILLIAM A. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971). Because agencies aim to enlarge their expected discretionary budgets while minimizing their responsibilities—to be paid more for doing less—the result is systematic inefficiency: The "budget of a bureau is too large, the output * * * is generally too small and that inefficiency in production is generally the normal condition." William A.

Niskanen, *Bureaucracy*, in THE ELGAR COMPANION TO PUBLIC CHOICE 264 (2001). Countless empirical studies have confirmed this phenomenon. See DENNIS C. MUELLER, PUBLIC CHOICE III 373-379 (2003) (reviewing fifty-six studies finding inefficiency in comparison with private firms engaging in similar activities).

Even the best government agencies indulge some inefficiency, of course, but they are typically constrained by important limits on their revenues and spending. Ordinarily, an agency must persuade appropriators to grant funding increases. Thus, the costs of such persuasion are a natural and routine brake on inefficiency and agency growth.

Not so with the Board. It enjoys both the power to set its own budget and the power to raise revenue by levying taxes—a quintessential legislative power. See U.S. Const. art. I, § 8 ("Congress shall have Power To lay and collect Taxes"). Congress thus effectively granted the board a monopoly, relieving it of the need to persuade appropriators and compete for funds with other agencies. Yet, having created an agency with the ability to generate out-of-control costs, Congress also eliminated the principal check on those costs: presidential oversight. The Board is overseen only by another agency with similar inherent budget-expanding incentives. The President has no meaningful ability to use his appointment and removal power to demand efficiency or to rein in the costs of executing the law.

Second, and even more fundamentally, Congress's creation of an agency immune from presidential control strengthens its own power relative to that of the President. But as a formidable body of literature confirms, these conditions are the very opposite of those

needed for good government. The perils of unchecked legislative control are well-known: what the Framers called "factions," and what public choice scholars call "interest group" dominance. See generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965). Because Congress "is made up of hundreds of coequal individuals, each concerned with bringing home the bacon," legislative power is particularly vulnerable to the influence of interest groups that do not represent the public as a whole. Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS. 1, 15 (1994). And because Congress exerts control over agencies by creating the procedures and authority under which they operate, interest group dominance of the legislature can translate into dominance of the agencies. See Mathew D. McCubbins, *et al.*, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

Indeed, the threat to good government from legislative aggrandizement is particularly acute when it comes to designing the structure of new regulatory agencies. Propelled by narrow interest groups, legislators have a powerful incentive to create agencies immune from presidential oversight. Such oversight can threaten those interest groups' ability to maintain control over the agencies down the road.[6] See

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[6] The effect of this powerful incentive for interest groups to dominate agency design is compounded by the fact that ordinary citizens have little interest and expertise in issues involving agency structure. And where broad constituency influences are largely absent, "legislators' political antennae are fully sensitive to the demands of organized interest groups, who do care about structure, pressure for what they want, and know how to use their political resources to shape the popularity and electoral prospects of legislators." Moe & Wilson, *Presidents*, at 8.

Moe & Wilson, *Presidents*, at 6 (explaining how today's winners "fashion structures to insulate them from ongoing democratic control, exercising most of their control *ex ante*, via structural design, rather than *ex post*"). In other words, "[a]gencies are insulated precisely because those who create them do not want them held accountable by tomorrow's authorities." *Ibid.*

The principal source of tomorrow's accountability—and thus the chief bulwark against interest group dominance of agencies—is the President. With respect to their institutional incentives, "presidents are dramatically different from legislators." *Id.* at 12. They "pursue interests that are often incompatible with, and indeed threatening to, the interests of most of the other major players." *Id.* at 11. Representing a heterogeneous national constituency, presidents (of whatever party) are more likely than Congress to resist parochial agendas and to concern themselves more broadly with the public interest. And critically, "[u]nlike legislators, presidents are held responsible by the public for virtually every aspect of national performance." *Ibid.* Because they are more likely to take the blame, presidents are more likely to be responsive to agency and regulatory failures. As a result, "they are the only players * * * who are motivated to seek a unified, coordinated, centrally directed bureaucratic system." *Ibid.*

Good government thus cautions against permitting Congress to overpower the President by insulating an agency from presidential control. Because the Framers understood this well, it is no coincidence that the Constitution requires what good government recommends. As this Court observed in *Printz* v. *United States*, 521 U.S. 898, 922 (1997), the "insis-

tence of the Framers upon unity in the Federal Executive" was "to ensure both vigor and accountability." See also STEPHEN BREYER, ACTIVE LIBERTY 16 (2007) (observing the Constitution's purpose to design institutions in a manner "capable of translating the people's will into sound policies"); Moe & Wilson, *Presidents*, at 14, 18 (explaining how the President's formal constitutional powers—such as appointment—are "of enormous consequence" because they enable the President "to make many important structural choices on [his] own, without going through the legislative process"); *Chadha* v. *INS*, 634 F.2d 408, 423 (9th Cir. 1980) (Kennedy, J.) (wherever "'the right both of making and enforcing the laws, is vested in one and the same man,'" "'there can be no public liberty'" (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES *146-147)), *aff'd*, 462 U.S. 919 (1983). This is especially so where an agency is granted criminal law enforcement authority, which "is manifestly and quintessentially executive power." *United States* v. *Lara*, 541 U.S. 193, 216 (2004) (Thomas, J., concurring); accord, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985) (criminal prosecutorial decisions have "long been regarded as the special province of the Executive Branch").

Plainly, Congress too has a vital democratic role to play, but an agency designed by Congress to be entirely immune from presidential oversight lacks the many checks that only a President can bring: coordination with other executive functions, prominent and undivided public accountability, and the incentives necessary to resist narrow interest group pressures.

Unlike other "independent" agencies, the Board here is not "insulate[d] * * * , *to a degree*, from 'the exercise of political oversight,'" *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1815 (2009) (Breyer, J., dissenting) (quoting *Freytag* v. *Comm'r*, 501 U.S. 868, 884 (1991) (Scalia, J., concurring in part and concurring in the judgment) (emphasis added)); it is insulated from such oversight *entirely*. If one were to analogize government agencies to a sound system, it might be said that traditional independent agencies *muffle* the democratic signal. The Board, by contrast, does not merely muffle the signal, it *mutes* it. Completely cut off from the citizenry by any political accountability, the Board is both a broken "microphone" (it cannot "pick up" signals from the public) and a muted "speaker" (having failed to pick up the public's signals, it cannot transmit them).

The Board's subservience to the SEC does not remedy this problem; it exacerbates it. As Judge Kavanaugh explained in his dissent below, "it is undisputed that the SEC as an independent agency is not the President's alter ego." Pet. App. 43a. Its own members are removable only for "cause." Thus, the SEC's role as an intermediary between the President and the Board is the "world of difference between the legion of *Humphrey's Executor*-style agencies and the PCAOB." *Id.* at 42a. Layering the SEC over the Board creates a "double for-cause removal structure" (*id.* at 73a) that amounts to "*Humphrey's Executor* squared" (*id.* at 42a). Unlike an ordinary independent agency, the Board is insulated (by the SEC) from all practical presidential oversight.

As discussed below, the Board's lack of these structural checks has led to the aggrandizement of its power, even internationally, and to uncoordinated

law enforcement efforts on the domestic front—*i.e.*, to bad policy.

II. The Board's Defective Structure Has Resulted In Widespread Policy Failures.

Not surprisingly, the Board's constitutionally faulty structure has led to bad results in practice. By definition, of course, the less a "democratic" government is accountable to the political process, the less it is effective. But the problem is deeper than that. "When structure fails, liberty is always in peril." *Public Citizen*, 491 U.S. at 468 (Kennedy, J., concurring in judgment). Because the Board is utterly disconnected from its constitutionally prescribed Executive command center, the Board consistently *fails to coordinate* with other agencies—leading to confusion among regulated parties, especially abroad, and to the worst forms of duplicative and burdensome regulation at home.

A. The Board's lack of coordination with the Executive Branch in regulating foreign firms has created confusion abroad and undercut the President's ability to speak with one voice in foreign affairs.

The Board's track record confirms that granting vast power to an unaccountable agency leads to further aggrandizement of the agency's power and works against coordinated problem-solving. One of the most powerful illustrations of this problem is the Board's involvement in the regulation of foreign accounting firms—an issue that implicates not only the President's executive power generally, but his specific charge to speak for the United States in the field of foreign affairs. As this Court recognized in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304,

320 (1936), the "power of the President" in foreign affairs is "very delicate, plenary and exclusive": He is "the sole organ of the federal government in the field of international relations—[and this is] a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." See also *Republic of Iraq* v. *Beaty*, 129 S. Ct. 2183, 2191 (2009); *Pasquantino* v. *United States*, 544 U.S. 349, 368-370 (2005). The Board's lack of accountability, and the manner in which it has exercised its unreviewable authority, contravene this principle.

1. Under the Sarbanes-Oxley Act, the Board is charged with regulating international accounting firms that audit American companies. See 15 U.S.C. § 7216. This is a vast mandate. Indeed, the Board has recently announced that it will begin inspections in just a few months in the following countries:

- Argentina
- Australia
- Brazil
- Canada
- Chile
- China
- Finland
- France
- Germany
- Greece
- Hong Kong
- Indonesia
- Ireland
- Israel
- Kazakhstan
- Korea
- Mexico
- Netherlands
- New Zealand
- Norway
- Philippines
- Portugal
- Russia
- Singapore
- Sweden
- Switzerland
- United Kingdom

See *PCAOB Plans International Inspections* (available at www.webcpa.com/news/31255-1.html) (Apr. 8, 2009).

This massive initiative is placing a strain on the Board's already considerable budget, which is growing by 9% this year in large part to pay for foreign auditors. "In addition to the time and travel demands, PCAOB officials say foreign inspections drain the resources of the [Board's] Office of International Affairs, which is responsible for maintaining relationships with the Board's non-U.S. counterparts." Ken Rankin, Board Approves PCAOB Budget (avail. at: www.webcpa.com/ato_issues/2009_1/30103-.html) (Jan. 5, 2009). And according to one member, even 9% growth is not enough; "he would press to divert funds from other areas to finance overseas inspections." *Ibid.*

Exploding budget demands, however, are likely the least troubling aspect of the Board's global reach—and not only because the Board can levy taxes to meet whatever budget it sets for itself. The bigger problem is that imposing American accounting standards has triggered "strenuous objections abroad," Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 BROOKLYN J. INT'L L. 883, 909 (2009), including threats of retaliation. According to the internal markets commissioner for the European Union, "The PCAOB's approach may lead to mounting pressure to require U.S. audit firms to register in the EU." Jim Peterson, *Balance Sheet: Accounting Rules as Melodrama*, NEW YORK TIMES (May 10, 2003).

Not only are foreign firms loath to face two sets of *regulators* (one from their own country, the other the

PCAOB), they are loath to face two sets of *regulations*. "French law, for example, makes it a crime punishable by prison for an auditor to disclose its clients' secrets. Yet to comply with [the PCAOB's regulations] a firm is obliged to produce, on request, both its working papers and the testimony of its personnel." *Ibid.* Nor is France alone. "[H]ow is a German auditor," for her part, "to reconcile the U.S. requirement for testimony with the German constitutional protection against self-incrimination?" *Ibid.* In short, from the perspective of our trading partners, "non-U.S. firms are under legal burdens they cannot waive, and the [PCAOB] cannot inflict its unilateral will, however noble it may deem its purpose." *Ibid*; see generally BUTLER & RIBSTEIN, THE SARBANES-OXLEY DEBACLE, at 71-74.

But "inflict[ing] its unilateral will" is the PCOAB's very reason for existence. As one Senator put it during floor debate, attempting to offer the Board a compliment:

> This Board is going to have massive power, unchecked power, by design. * * * We are setting up a board with massive power that is going to make decisions that affect all accountants and everybody they work for, which directly or indirectly is every breathing person in the country. They are going to have massive unchecked powers.

148 Cong. Rec. S6334 (daily ed. July 8, 2002) (statement of Sen. Gramm). This statement approaches the truth: The Senator failed only to note that the Board's "massive unchecked power" would extend "by design" to "every breathing person" on the *planet*.

2. Granting this kind of unchecked power to an agency whose leadership cannot be removed by the

President flies in the face of the constitutional design. It is one thing for a department head such as the Secretary of State to exercise authority in foreign affairs; she serves at the pleasure of the President. It is another for one of the traditional independent agencies such as the SEC to create regulations that may apply abroad. But it is a different matter entirely for an agency that cannot be controlled in any sense by the President to have "massive unchecked powers" in foreign affairs.

Indeed, the problem posed by the Board's unchecked power in foreign affairs dates back to the Articles of Confederation, under which the Continental Congress was impotent to prevent States, which were not answerable to the President, from conducting their own foreign policy. See John Jay, *In An Address to the People of the State of New York on the Subject of the Constitution*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 69, 72 (Paul Ford ed., 1971). Consequently, States were regularly causing foreign policy embarrassments. The turmoil created by these multifarious foreign policies was "a major drive wheel in the movement for constitutional reform." FREDERICK W. MARKS, III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 50 (1973). "Nothing contributed more directly to the calling of the 1787 Constitutional Convention than did the spreading belief that under the Articles of Confederation Congress could not effectively and safely conduct foreign policy." Walter LeFeber, *The Constitution and United States Foreign Policy: An Interpretation*, 74 J. AM. HIST. 695, 697 (1987).

Since the Founding, therefore, this Court has consistently shown its "concern for uniformity in this

country's dealings with foreign nations." *Banco National de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964). In *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000), for example, the Court invalidated a Massachusetts statute that interjected the Commonwealth into a foreign policy matter—in that case, by imposing economic sanctions on companies doing business with Burma. While the Court ultimately rested its decision on federal preemption, the Court strongly condemned Massachusetts' interference with foreign policy negotiations: "It is not merely that the differences between the state and federal Acts * * * threaten to complicate discussions; they compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Id.* at 381. This in turn would deprive the President of "economic and diplomatic leverage" in negotiations. *Id.* at 377. The Court concluded that "the President's maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy, without exception for enclaves fenced off willy-nilly by inconsistent political tactics." *Id.* at 381; see also THE FEDERALIST NO. 44, at 299 (James Madison) (J. Cooke ed., 1961) (emphasizing "the advantage of uniformity in all points which relate to foreign powers").

Similarly, the Court in *American Insurance Association* v. *Garamendi*, 539 U.S. 396 (2003), struck down a California law that required foreign insurers doing business in the State to disclose information concerning Holocaust-era insurance policies issued overseas. Because the Executive Branch had negotiated various executive agreements with foreign nations that took a different approach to the same issue, the Court held that California's policy was preempted

by the Executive's authority over foreign affairs. In so holding, the Court emphatically reaffirmed "the President's 'vast share of responsibility for the conduct of our foreign relations.'" *Id.* at 414 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring)). He "has 'the lead role * * * in foreign policy'" and "can 'act in external affairs without congressional authority.'" *Id.* at 414, 415 (citations omitted).

To be sure, the statute here is a federal law, and the Board is not a State. But like Massachusetts in *Crosby* and California in *Garamendi*, the Board is nonetheless operating as its own impermissible foreign policy enclave. Lacking any oversight by the President or need to cooperate with agencies under his oversight, the Board is a free-wheeling, self-funded quasi-state, negotiating with foreign nations in the name of the United States, but ultimately only for itself. This is a recipe for just the kind of embarrassments created under the Articles of Confederation—the kind of embarrassments avoided by the uniformity called for in *Banco National de Cuba*, *Crosby*, and *Garamendi*.

This Court has recognized "the Framers' overriding concern that 'the Federal Government must speak with one voice when regulating commercial relations with foreign governments.'" *Japan Line, Ltd.* v. *Los Angeles County*, 441 U.S. 434, 449 (1979) (quotation omitted). And as James Madison put it in *Federalist No. 42*, "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations." *Id.* at 279. As a federal agency that is wholly unaccountable to the President yet engaged in foreign commercial regulation, the Board starkly violates these principles.

B. The Board's lack of coordination with other agencies has created duplicative and overly burdensome regulation.

Nor does the burden of submitting to the Board extend only to foreign firms. American companies—and the American economy—are likewise laboring under its weight. As with foreign firms, the challenge for American companies is not merely that of new regulations and investigations, but of new regulations and investigations piled on top of existing ones—two sets of regulations that frequently conflict.

1. In its first year alone, the Board imposed more than $35 billion in direct costs on American businesses. HANS BADER & JOHN BERLAU, THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD: AN UNCONSTITUTIONAL ASSAULT ON GOVERNMENT ACCOUNTABILITY 3 (2005). But this number, while staggering, is dwarfed by the net loss to the American economy posed by Sarbanes-Oxley at large. According to the best available evidence, Sarbanes-Oxley "has imposed a net loss on the American economy of $1.4 trillion." BUTLER & RIBSTEIN, THE SARBANES-OXLEY DEBACLE, at 5 (citation omitted). Firms spent a total of $6 billion complying with Sarbanes-Oxley in 2006. *Ibid.* "Large firms' financial officers, surveyed in 2007, said their companies spent an average of $1.7 million each to comply with [Sarbanes-Oxley]." Larry E. Ribstein & Henry N. Butler, *Where Was SOX?*, FORBES (Dec. 22, 2008) at 28.

This regulatory burden is due in significant part to the fact that the Board duplicates requirements already imposed by other agencies. Perhaps the most glaring example of this piling-on is in the banking industry. As name-sponsor of Sarbanes-Oxley, former-

House Financial Services Committee Chairman Michael Oxley, has explained, Sarbanes-Oxley requires the Board to regulate "internal controls" of publicly traded companies—a provision that "was two paragraphs long, but by the time the PCAOB was done, it was 330 pages of regulations. It was far too prescriptive and [more] expensive than anyone anticipated." Stephen Taub, *Oxley: I'm Not Happy With Sarbox*, CFO.com (Apr. 6, 2007). But this was not the worst of it. Those 330 pages were *on top of* like regulations already imposed on the banking industry.

The "internal controls" requirement, Oxley explained, "was really taken from a banking statute. * * * *So banks ended up with the worst of all worlds—existing banking regulations and [Sarbanes-Oxley].*" *Ibid.* (emphasis added). "For banks," Oxley continued, "it is an unnecessary regulatory burden [in addition to those] they are already complying with." *Ibid.* "[Banks] should have been exempted." *Ibid.*

The same duplication problems plague in-house controllers and accountants. "The SEC and PCAOB have issued two sets of guidance rules to perform the same assessment task," the Institute of Management Accountants ("IMA") explains, "resulting in unnecessary confusion and complexity for management." Press Release, *IMA Responds to SEC and PCAOB Exposure Drafts on SOX: Much More is Needed to Get It Right* (Feb. 27, 2007). "Without major changes," IMA emphasized, "PCAOB's new audit standard will" be the "costly de facto standard." *Ibid.* These problems of duplication also necessarily arise in the context of investigations into allegations of misconduct in public companies, as accounting firms find themselves responding to simultaneous and

overlapping requests for information by the SEC and the Board.

If the President could control the Board, he could lift this "unnecessary regulatory burden," prevent the "unintended confusion and complexity," and ultimately adjust this "costly de facto standard." But Congress did not afford the President any power to control the Board—even the power of "for cause" removal of the Board's members.

2. To make matters worse, the Board not only fails to coordinate with other agencies on shared responsibilities; it is unresponsive to the public on matters in which it has *sole* responsibility. This should come as little surprise for an agency that is both uncontrolled and self-funded: The Board has no meaningful institutional incentive to recognize or remedy its mistakes.

For example, the Board publishes on its website oblique reports about its investigations of accounting firms. See Sarah Johnson, *Why the Big Four Are Still A Big Mystery*, CFO.com (Jan. 26, 2007). But these reports are stripped of critical contextual information, such as how many total audits the firm performed (and thus whether the audit was fairly representative of the firm's work), and how long ago the inspections were performed. *Ibid.* As one leading academic commentator put it, "I wonder about the effectiveness of this process if the 2005 reports are just getting posted in January 2007." *Ibid.* Moreover, the reports are not intended to discuss a firm's strengths, but instead are based on inspections targeted at higher-risk audits. *Ibid.* There is therefore a built-in selection bias toward finding and documenting weaknesses.

None of this, of course, is to say the Board should not conduct such inspections. Nor is it to say that the Board should not (as the Board puts it) conduct a "dialogue" with regulated firms. *Ibid.* It is, however, to note the oddity of the Board publishing this manifestly confusing "dialogue" on the Internet. And more importantly, it is to observe that an entity accountable to the President would have both a greater *sense* of responsibility (through the democratic process) and *actual* responsibility (because of its accountability to the President) to confront this seeming excess.

For the same reason, the Board also has little institutional reason to consider the effect of its regulations on the American economy. And the Board's actions have imposed real costs.

As we have already noted, Sarbanes-Oxley imposes direct economic costs of $1.4 trillion annually—a significant portion of which has been imposed by the Board. What this number fails to show, however, are the unstated costs to the economy of companies that refuse to go public, decide to go public overseas, or simply de-list—all because Sarbanes-Oxley and the PCAOB have so raised the cost of doing business. In the mid-1990s, "the median market cap[italization] of a company going public was $52 million"; [t]oday it has shot up to $227 million. John Berlau, *The Downside of Sarbox: Bad News for Stock Investors*, STOCKS, FUTURES & OPTIONS MAGAZINE (Apr. 2007). In other words, "average investors are now often shut out of the company's growth to the $200 million mark." *Ibid.*

Why? "[T]he consensus is that," compared to the period before Sarbanes-Oxley, "it is roughly four times as expensive to go public today." *Ibid.* Thus, it

is unsurprising that "[b]ankers in the City of London * * * would like to erect a solid gold statue in honor of the legislators who sponsored [Sarbanes-Oxley], for their efforts * * * certainly resulted in shifting a massive proportion of the mergers and acquisitions boom to Britain." CLAIRE BERLINSKI, THERE IS NO ALTERNATIVE: WHY MARGARET THATCHER MATTERS 148-49 (2008).

We are not suggesting that independent agencies have no role to play in regulation of the economy. The Federal Reserve and the SEC, to cite just two examples, are longstanding testimonies to Congress's judgment that depoliticizing market regulation will preserve confidence among market participants that government decisionmakers will act impartially. But even in these sensitive contexts, the Constitution requires *some* measure of democratic and political accountability. In recognition of this, traditional independent agencies are at least run by persons appointed by the President and subject to the President's "for cause" removal power. Here, however, the balance between integrity and democratic politics is lopsided: There is *no* political control.

* * * * *

In creating the Board, Congress created an agency that is uniquely unaccountable to the President and, ultimately, to the people. The Board has no meaningful institutional incentive to limit its reach, to coordinate with other federal agencies (whether traditional or independent), or to avoid duplicative and burdensome regulation.

Not surprisingly, the Board has exercised its unreviewable authority in a manner that reflects these failures in constitutional design. It has aggrandized

its authority both domestically and internationally; it has engaged in extensive extraterritorial regulation, creating foreign policy difficulties; and it has heavily burdened the economy by imposing a second set of overlapping, sometimes conflicting rules on American firms, driving many of them abroad. Of course, if the Board were a resounding policy success, that would not eliminate the constitutional defects in its design. But it is not a success, and its failures stem directly from its constitutional deficiencies.

This case thus powerfully illustrates the principle that "[w]hen structure fails, liberty is always in peril." *Public Citizen*, 491 U.S. at 468 (Kennedy, J., concurring in judgment). As the Framers recognized, presidential control over the use of executive power by federal agencies is indispensable to good government and, ultimately, liberty.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 08-861

In The Supreme Court of the United States

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,
Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR THE CENTER FOR AUDIT QUALITY AS *AMICUS CURIAE* SUPPORTING RESPONDENT PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

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BRIEF FOR THE CENTER FOR AUDIT QUALITY AS *AMICUS CURIAE* SUPPORTING RESPONDENT PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

The Center for Audit Quality ("CAQ") respectfully submits this *amicus curiae* brief on behalf of itself and its members in support of Respondent Public Company Accounting Oversight Board ("PCAOB" or the "Board").*

INTEREST OF *AMICUS CURIAE*

The CAQ is a public policy organization that seeks to foster confidence in the audit process and to aid investors and the capital markets by advancing constructive suggestions for change, rooted in the audit and accounting profession's core values of integrity, objectivity, honesty, and trust. Any U.S. accounting firm registered with the PCAOB may join the CAQ. The CAQ is affiliated with the American Institute of Certified Public Accountants ("AICPA"), and has approximately 700 U.S. public company

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* Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the Center for Audit Quality, its counsel, and its members made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief by all parties have been submitted to the Clerk.

auditing firms as members, representing tens of thousands of professionals dedicated to audit quality.

The CAQ seeks to improve the reliability of public company audits and to enhance their relevance for investors, particularly in this time of growing financial complexity and globalization. The CAQ is dedicated to helping increase public confidence in the auditing process and to maintaining high standards in the accounting profession. To fulfill its mission, the CAQ offers recommendations to policymakers, issues technical support for public company auditing professionals, and participates in the public discussion about financial reporting.

Accordingly, the CAQ has a keen interest in cases, such as this one, concerning the regulation of auditors and the audit process, and their broader impact on investors and the capital markets. This brief does not address the constitutional questions raised by Petitioners, but rather provides context to help the Court understand the PCAOB's role in achieving the goals Congress embodied in the Sarbanes-Oxley Act, from the perspective of the profession the PCAOB regulates.

STATEMENT

Congress passed the Sarbanes-Oxley Act of 2002 (the "Act"), Pub. L. 107-204, 116 Stat. 745, in response to scandals that exposed serious weaknesses in the financial reporting required by publicly held companies. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 669 (D.C. Cir. 2008). The Act has many provisions focused on enhancing the accuracy and reliability of financial statements, including a requirement for management certifications relating to financial

statements, new disclosures and audit procedures related to internal controls, and an enhanced role for audit committees. *See, e.g.*, 15 U.S.C. §§ 7241, 7262, 78f. The centerpiece of the legislation is the creation of the Public Company Accounting Oversight Board.

Prior to the adoption of the Act, regulation of the audit profession was decentralized. Beginning with the Securities Act of 1933, Congress enacted a series of laws that required public companies to have financial statements audited by independent accountants; but the Securities and Exchange Commission ("SEC") chose not to exercise formal power to regulate the methods used to audit financial statements included in SEC-mandated filings. Instead, the SEC generally looked to the states, which in turn often adopted the AICPA's guidance.

The passage of the Sarbanes-Oxley Act in 2002 created a new paradigm for audit regulation, which relies heavily on the newly created PCAOB. The Act directs the PCAOB, under the oversight of the SEC, to regulate public company auditors and audit processes. The Act empowers the PCAOB, again subject to the oversight of the SEC, to register public accounting firms, establish auditing and ethics standards, conduct inspections and investigations of registered firms, and impose sanctions on registered firms and their personnel. *See* 15 U.S.C. §§ 7211(c), 7219(c), (d); *see also Free Enter. Fund*, 537 F.3d at 669.

Since January 2003, the PCAOB has registered more than 1,870 accounting firms; established auditing and ethics standards; conducted hundreds of inspections of registered firms; and imposed

disciplinary sanctions on firms and individuals. *See* 2008 PCAOB Annual Report at 7, 9 (2009).

SUMMARY OF ARGUMENT

Congress structured the PCAOB to ensure that the regulation of the profession is undertaken on an informed basis, but is not subject solely to the viewpoint of the profession. This structure enables the Board to reflect best practices in the profession and to serve the interests of the public.

Although only a few years have passed since the passage of the Sarbanes-Oxley Act, the evidence demonstrates that regulation by the PCAOB has led to substantial progress in meeting Congress's goals of improving audit quality and increasing investor confidence.

PCAOB inspections have improved audit quality in a number of ways. These inspections provide an independent review of audit quality, have focused firms on remediating audit issues identified during the inspections, and have provided transparency to audit committees and investors.

Moreover, the PCAOB's oversight of the profession brings with it stability and predictability that is beneficial to both the investing public and the audit profession. The profession appreciates the benefits that a tough but fair, well-informed and appropriately focused regulator can bring to audit quality, and recognizes that an entity charged with audit regulation provides corresponding benefits to investors.

No profession or industry seeks regulation with open arms, and the CAQ and its members have had and will continue to have views that diverge from the PCAOB on various matters. Nevertheless, the

establishment of the PCAOB has generally been seen by auditors as a net positive for the profession, capital markets, and investors. Were the Court to strike down the PCAOB, all of these benefits—expert, focused regulation; improved audit quality through a system of inspections emphasizing remediation; and stability of the regulatory regime—would be cast aside.

ARGUMENT

I. CONGRESS STRUCTURED THE PCAOB TO PERFORM ITS DUTIES EFFECTIVELY.

Congress carefully structured the PCAOB's membership. The Board has five members, who are to be appointed "from among prominent individuals of integrity and reputation who have a demonstrated commitment to the interests of investors and the public." 15 U.S.C. § 7211(e)(1). Significantly, "[t]wo members, and only 2 members, of the Board shall be or have been certified public accountants." *Id.* § 7211(e)(2). Congress chose this balanced membership to serve two goals: first, the PCAOB's authority over the profession and auditing principles was designed to be exercised and informed by individuals who are knowledgeable about the performance of audits; and second, the viewpoint of the profession will not dominate the Board's analysis of any issue.

This structure was intended to ensure that the highly technical regulation of auditing practice is conducted on an informed basis. Generally, the Board has three broad functions: adopting auditing, quality control, ethics and independence standards related to the preparation of audit reports; inspecting registered firms; and investigating registered firms

and their personnel. *Id.* § 7211(c)(2)-(4). By ensuring that accounting professionals have a significant but not dominant role on the Board, Congress intended that audit-relevant experience would be brought to bear to guide the Board's operations. And by placing these functions in a focused and expert entity, Congress intended to ensure that these powers would be exercised in a manner that protects the investing public and accurately reflects professional standards.

The PCAOB's overall structure reflects a further Congressional determination that, in order to secure these benefits, the Board—while operating under the oversight of the SEC—had to be a private body for certain purposes. *Id.* § 7211(b). In such significant areas as budgeting and hiring staff, Congress decided that expert regulation would be best placed in a private entity. *Id.* § 7211(c)(7). In particular, Congress directed that the Board be able to pay its staff "at a level that is comparable to *private sector* self-regulatory, accounting, [or] technical" salaries. *Id.* § 7211(f)(4) (emphasis added).

Although these goals could conceivably be pursued through other structures, Congress chose to design the PCAOB in this manner. Changing the structure would inevitably result in a change to the focus and expertise of the Board as carefully created by Congress, and to the make-up of the Board and its staff.

II. AUDIT QUALITY AND INVESTOR CONFIDENCE HAVE IMPROVED SINCE THE CREATION OF THE PCAOB.

One of the Act's main goals is to increase investor confidence in U.S. capital markets by strengthening financial reporting. *See, e.g.,*

Sarbanes-Oxley at Four: Protecting Investors and Strengthening the Markets, Hearing Before the H. Comm. on Fin. Servs., 109th Cong. 44-45 (2006) (Statement of Rep. Michael G. Oxley, Chairman, House Comm. on Fin. Servs.).

As with any major piece of ground-breaking legislation, various provisions of the Act have come under criticism, but "[r]egulators, public companies, audit firms, and investors generally agree that the Sarbanes-Oxley Act of 2002 has had a positive and significant impact on investor protection and confidence." Government Accountability Office, GAO-06-361, *Sarbanes-Oxley Act: Consideration of Key Principles Needed in Addressing Implementation for Smaller Public Companies*, cover page (2006). Indeed, the Act has been described as a "godsend" to investors, producing "major benefits" including "more reliable corporate financial statements." David Henry, "Not Everyone Hates SarbOx," *Business Week*, Jan. 29, 2007.

Although its critics complain that the PCAOB is not "an efficient, convenient, or ultimately useful means of regulating the accounting industry," Cato Br. at 10, the evidence of the PCAOB at work is to the contrary: Investor confidence has increased since the establishment of the PCAOB and the implementation of other Sarbanes-Oxley reforms, and the PCAOB's inspection process has contributed to improved audit quality.

A. Investors have more confidence in U.S. capital markets.

As then SEC Chairman Christopher Cox recognized in 2006, "[w]e have come a long way since 2002. Investor confidence has recovered. There is greater corporate accountability. Financial reporting

is more reliable and transparent. Auditor oversight is significantly improved." *Sarbanes-Oxley at Four: Protecting Investors and Strengthening the Markets*, 109th Cong. 56 (testimony of Christopher Cox, Chairman, SEC). All of these benefits are directly traceable, at least in part, to the actions of the PCAOB.

A national survey of investors conducted by the CAQ in 2007 found that 84 percent of investors "have confidence in the U.S. capital markets," and 80 percent of investors have confidence in "the financial information provided by public companies." Press Release, Center for Audit Quality, Center for Audit Quality Survey Finds Majority of Nation's Investors Support Sarbanes-Oxley, Believe Rules Mandated by Act Should Not Be Eased (July 28, 2007) ("July 2007 Press Release"), available at http://www.thecaq.org/newsroom/release_07282007.htm.[1] Sixty percent of investors surveyed said "they have more confidence in audited financial information released by publicly traded U.S. companies than they used to." Center for Audit Quality Research Summary for Telephone

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[1] The CAQ engages in regular telephone and internet surveys of stakeholders in the audit process, including investors and audit committee members. In particular, the CAQ conducted telephone surveys of approximately 1,000 investors in July 2007, July 2008, and September 2009. The CAQ also conducted an internet survey of audit committee members in March 2008. These surveys help the CAQ to promote informed dialogue about issues of importance to the U.S. capital markets for the benefit of investors, the public company auditing profession and the markets as a whole.

Survey conducted July 17-23, 2007 at 1 ("2007 Research"), available at http://www.thecaq.org/events/sox/researchsummary.pdf.

This increased confidence can be traced specifically to the work of the PCAOB, whose involvement 76 percent of investors agreed has been effective, and 28 percent of investors described as "*very* positive." 2007 Research at 2. Seventy-nine percent of investors surveyed attributed bolstered confidence in public companies' financial information to "changes brought about by the Sarbanes-Oxley Act," and two-thirds of investors "would be concerned by any easing of rules mandated by the Sarbanes-Oxley Act." July 2007 Press Release.

Even as the general decline in U.S. capital markets was taking hold, a survey of investors conducted by the CAQ in July 2008 showed that 70 percent of investors surveyed "expressed confidence" in U.S. markets. Press Release, Center for Audit Quality, Investor Confidence in U.S. Capital Markets Declines Due To Energy Costs, Weak Dollar and Home Foreclosures (July 30, 2008), available at http://www.thecaq.org/newsroom/release_07302008.htm. A survey of investors completed in September 2009 shows that investor confidence has stabilized, with 73 percent of investors expressing confidence in U.S. capital markets, a slight increase over 2008. Press Release, Center for Audit Quality, Investor Confidence in U.S. Capital Markets Stabilizes Despite Economic Turmoil (September 30, 2009), available at http://www.thecaq.org/newsroom/release_09302009.htm. The decrease in investor confidence since 2007 is not surprising given the market upheaval, but the number of positive responses demonstrates that a supermajority of U.S.

investors have confidence in the U.S. markets as appropriately regulated.

These surveys demonstrate that investors view themselves as "benefit[ing] from the stronger internal controls, greater transparency, and elevated accountability that have resulted from this new law." Committee on Capital Markets Regulation Interim Report at xiii (2006). And the increased investor confidence supports the conclusion that the Act is working, and that the PCAOB's vital role in the administration of that law has been successful.[2]

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[2] Critics assert that the Act imposes unnecessary costs on the American economy. *See, e.g.*, Cato Br. at 24. Most of this criticism, however, centers on Section 404, which sets forth internal control reporting requirements—requirements imposed directly by Congress. In any event, "[m]any believe that the SOX 404 'is working,'" and "[t]he academic research provides important support for these conclusions." Robert Prentice, *Sarbanes-Oxley: The Evidence Regarding The Impact of SOX 404*, 29 Cardozo L. Rev. 703, 715 (2007) (citations omitted). As then SEC Chairman Cox recognized, "it is wrong to conflate the implementation problems of 404 with the entirety of the Sarbanes-Oxley Act. While it's a handy whipping boy, overall the law has had important positive effects. It may fairly be credited with correcting the most serious problems that beset our markets just a few years ago. It has played a significant role in restoring integrity to our markets." Remarks to the U.S. Chamber of Commerce's First Annual Capital Markets Summit: Securing America's Competitiveness (Mar. 14, 2007).

Even where criticisms over Section 404 are raised, it is often acknowledged that the Act on the whole improved corporate governance. "The vast majority

[Footnote continued on next page]

B. The PCAOB inspection process improves audit quality.

Under the Act, the PCAOB is tasked with carrying out inspections of registered accounting firms. 15 U.S.C. § 7214(a). The largest registered firms—those with more than 100 issuer clients—are inspected annually, and smaller registered firms are inspected once every three years. *Id.* § 7214(b).

The PCAOB's inspections are "designed to identify auditing problems at an early stage and focus firms on correcting them." *Sarbanes-Oxley at Four: Protecting Investors and Strengthening Markets*, 109th Cong. 71 (testimony of Mark W. Olson, Chairman, PCAOB). PCAOB inspections "begin by looking at the professional environment in which audits are performed and focus on the influences—both good and bad—on a firm's audit practice. . . . PCAOB inspections are also risk-based, in that they focus on the aspects of audits that present the greatest risk." *Id.* The PCAOB's inspections are viewed as independent and reflecting a high degree of actual audit experience. Clive Lennox & Jeffrey Pittman, *Auditing the Auditors:*

[Footnote continued from previous page]
of the Act's provisions are: positive; easy to understand; improving corporate governance; cost effective; and consistent with the objective of reducing financial fraud." American Electronics Association, *Sarbanes-Oxley Section 404: The 'Section' of Unintended Consequences and its Impact on Small Business* 1 (Feb. 2005), available at http://www.acanet.org/governmentaffairs/AeASOXPaperFinal021005.asp.

Evidence on the Recent Reforms to the External Monitoring of Audit Firms 3 (October 2008) (explaining that the PCAOB is independently funded and employs inspectors without current ties to audit firms); *see also* 2008 PCAOB Annual Report at 5 (explaining that inspection team leaders for inspections of the largest firms average 27 years of relevant experience and other PCAOB inspectors average 15 years of relevant experience).

PCAOB inspections also increase audit quality by focusing on *remediation* of any quality issues identified. Congress decided in the Sarbanes-Oxley Act that quality control criticisms identified during an inspection remain non-public for a year after they are identified. 15 U.S.C. § 7214(g)(2). If those criticisms are not addressed to the PCAOB's satisfaction within the year period, they are then publicly reported. *Id.* This provides registered firms "additional incentive to correct problems." *Sarbanes-Oxley at Four: Protecting Investors and Strengthening Markets*, 109th Cong. 72 (testimony of Mark W. Olson, Chairman, PCAOB).

In 2008, the PCAOB made determinations concerning quality control remediation efforts related to 162 inspection reports. 2008 PCAOB Annual Report at 12. With respect to 117 of those reports, the PCAOB determined that the firm had implemented remediation steps to the PCAOB's satisfaction, and thus, per the congressional plan, did not make that section of the report public. *Id.* Mark Olson, then Chairman of the PCAOB, recognized that registered firms undertook remediation efforts as a result of inspections, explaining that "[w]hen firms approach inspections with a cooperative attitude, the PCAOB has been

able to achieve significant real-time improvements, often even before an inspection is concluded." *Sarbanes-Oxley at Four: Protecting Investors and Strengthening Markets*, 109th Cong. 72.

The U.S. Treasury Department's Advisory Committee on the Audit Profession noted in its final report that it "heard of many positive developments within the auditing profession in recent years and of a generally positive impact the [PCAOB] has had on audits." U.S. Treasury Department, Advisory Committee on the Auditing Profession, Final Report at II:1 (Oct. 6, 2008) (Co-Chair's Statement). Indeed, research suggests that audit quality has improved in the post-Sarbanes-Oxley Act era. *See* Lennox & Pittman, *Auditing the Auditors* at 25; Gerald J. Lobo & Jian Zhou, *Did Conservatism in Financial Reporting Increase After the Sarbanes-Oxley Act? Initial Evidence*, 20 Accounting Horizons 57 (2006); Daniel A. Cohen, Aiyesha Dey & Thomas Z. Lys, *Real and Accrual-Based Earnings Management in the Pre- and Post-Sarbanes Oxley Periods* (June 2007).

Significantly, audit committee members—to whom Congress gave an enhanced role in reviewing audit quality under the Act—have stated that audit quality has improved under the PCAOB. The CAQ conducted a survey of audit committee members in Spring 2008, and found that more than "three-quarters of audit committee members [surveyed] rate overall audit quality [as] 'very good' or 'excellent.'" Press Release, Center for Audit Quality, Post-SOX Audit Quality Has Improved, Say Nation's Audit Committee Members at 1 (Mar. 18, 2008), available at http://www.thecaq.org/newsroom/release_03182008.htm. Eighty-two percent of those surveyed

said that audit quality "has improved in recent years." *Id.* Sixty percent of audit committee members agreed that the risk of financial inaccuracies in reported statements due to fraud declined after the passage of the Act. *Id.* Increased external auditor scrutiny played a role in the low risk of fraud and materially inaccurate statements. *Id.* In general, 65 percent of audit committee members surveyed "agreed that investors should have more confidence in the markets as a result of the 2002 law," and 58 percent said changes resulting from the Sarbanes-Oxley Act "had a positive impact." *Id.*

The publication of inspection reports also increases transparency of the audit process to audit committees and the investing public by providing insight into areas where the PCAOB identified weaknesses or deficiencies through inspection. This additional information, in turn, assists audit committees in their oversight of the registered firms.

By conducting thorough inspections, focusing on remediation, and helping to improve the function of audit committees, backed up by the ability to impose meaningful sanctions, the evidence demonstrates that the PCAOB has contributed to improved audit quality. *See, e.g.*, Mark W. Nelson, *Ameliorating Conflicts of Interest in Auditing: Effects of Recent Reforms on Auditors and their Clients*, at 10-11 (July 11, 2005) (noting that the PCAOB's ability to conduct thorough inspections combined with the ability to levy significant sanctions "should encourage auditors to perform more effective audits").

III. STABILITY AND PREDICTABILITY IN AUDIT REGULATION PROVIDE BENEFITS TO INVESTORS AND THE AUDITING PROFESSION.

The Sarbanes-Oxley Act created the PCAOB to replace a system that had been criticized and in which Congress and the investing public had lost confidence. The PCAOB provides enhanced inspection and enforcement activities, along with greater clarity for auditors regarding rules to be followed in performing audits.

Since its establishment, then PCAOB Chairman Mark W. Olson explained, "[t]he Board has evolved from a start-up organization to a more steady state of operation." Melissa Hoffman Lajara, *Q&A with PCAOB Chairman Mark W. Olson*, The Trusted Professional: The Newspaper of the NYSSCPA, May 15, 2008, available at http://www.lucaonline.com/trustedprof/508a/tp4.htm. Over time, the PCAOB "has built and continues to refine its supervisory oversight programs to assure that it fulfills its statutory duty of overseeing auditors of public companies in order to protect the interest of investors." *Id.*

As the PCAOB continues to operate, and to develop its own rules of practice, the profession and the investing community will continue to benefit from its oversight. The profession recognizes that PCAOB standards and the close scrutiny of PCAOB inspections will drive auditor behavior with lasting effect across the profession. The PCAOB inspection process is generally viewed as an opportunity to improve audit quality, and to do so with the supervisory assistance of the PCAOB. A tough, but fair, expert, and independent regulator will continue

to help improve audit quality and to restore the confidence of the investing public.

Maintaining the PCAOB's oversight of the profession—and not dramatically changing the regulatory structure for the second time in less than a decade—will help to provide consistent and predictable regulation that can be relied upon both by auditors and by the investing public. As this Court has recognized, in the securities markets in particular, "uncertainty . . . can have ripple effects." *Cent. Bank v. First Interstate Bank*, 511 U.S. 164, 189 (1994); *see also generally, e.g.*, Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945, 962 (1993) (increases in "uncertainty deter beneficial conduct and breed costly litigation").

At a time of market and financial upheaval, overturning the established system of regulation will exacerbate investors' fears about the integrity of capital markets, and interfere with the ongoing work of regulation. Were the Court to find the PCAOB as established to be constitutionally impermissible, the uncertainty surrounding the effect of past regulations, and the question of what form future regulation would take, would have negative consequences for investors, the profession, and the markets generally.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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Nos. 08-861

In The

SUPREME COURT OF THE UNITED STATES

FREE ENTERPRISE FUND and BECKSTEAD AND WATTS, LLP,

Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD and UNITED STATES OF AMERICA,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

AMICUS BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF PETITIONERS

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BOTH 4V3560

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QUESTION PRESENTED

Whether petitioners had the right to seek declaratory or injunctive relief in federal district court, for the injuries they were suffering, and would suffer in the future, from the investigations, taxation policy, and other actions of respondent Public Company Accounting Oversight Board?

TABLE OF CITED AUTHORITIES

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INTEREST OF AMICUS CURIAE[1]

The Center for Individual Rights ("CIR") is a public interest law firm based in Washington, D.C. It has litigated constitutional issues in the federal courts and has a special interest in ensuring that effective remedies be available for violations of the Constitution. As an example, CIR represented parties who asked this Court to consider the Seventh Circuit's conclusion that Congress precluded lawsuits based upon the Constitution against recipients of federal funds when it passed Title IX and Title VI. Petition for Writ of Certiorari in Sup. Ct. No. 99-1691, *Boulahanis v. Bd. of Regents. Boulahanis v. Bd. of Regents of Illinois State University*, 530 U.S. 1284 (2000) (denying petition). In *Fitzgerald v. Barnstable School Committee*, 129 S. Ct. 788 (2009), this Court unanimously rejected the "preclusion" rule that CIR had challenged.

Here, respondents have made (and presumably will make again) a related argument: that the constitutional arguments plaintiffs wish to make must be channeled through the administrative procedures designed for

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

challenging the rules and orders of respondent Public Company Accounting Oversight Board ("PCAOB"). Because CIR believes that this argument, if accepted, would have deleterious consequences for effective constitutional challenge in other areas, it submits this amicus brief.

This amicus brief addresses only the issue described above. CIR supports petitioners' arguments on the merits.

SUMMARY OF ARGUMENT

The respondents have contended in the courts below that the statute creating the PCAOB has a "comprehensive review scheme," which divested the district court of jurisdiction to hear petitioners' constitutional arguments. The courts below have rejected this argument, and were correct to do so.

The flaw in the argument is its premise: that Sarbanes-Oxley, 15 U.S.C. §§ 7201 *et seq.*, creates a comprehensive review scheme for all lawsuits having anything to do with the PCAOB. A simple reading of the statute disproves that. There is a review scheme for rules created by the PCAOB and a review scheme for sanctions imposed by the PCAOB, but nothing else. The statute provides for administrative review, but has no special provisions for judicial review. Forcing petitioners to submit their sophisticated constitutional arguments to administrative bodies

wholly unequipped to address them would be a gratuitous exercise in delay.

While this Court has precluded attempts to circumvent comprehensive review schemes through lawsuits that challenge *anticipated* sanctions, nothing like that has happened here. The petitioners here do not complain about a sanction or an anticipated sanction, but rather the burden it must undergo in complying with investigations and assessments by the PCAOB. Nothing in the statute provides for an appeal (administrative or otherwise) for those burdened by such ongoing investigations and assessments, and, accordingly, nothing in the statute precluded the district court from exercising jurisdiction over petitioners' constitutional challenges.

ARGUMENT

In the absence of any statutory preclusion, petitioners' allegations that the Sarbanes-Oxley Act violated the United States Constitution and was being enforced by respondents to their injury, constituted a claim that arose under federal law and for which the district court was competent to provide relief. It is axiomatic that individuals whose constitutional rights are being violated can sue in federal district court for a judgment enjoining those violations. *Cf. Davis v. Passman*, 442 U.S. 228, 242 (1979) ("[W]e presume that justiciable constitutional rights are to be enforced through the courts.")

The Sarbanes-Oxley Act has two primary provisions relating to the review of actions by the PCAOB. Section 107(b)(4), 15 U.S.C. § 7217(b)(4), states that "[t]he provisions of paragraphs (1) through (3) of section 78s(b) of this title shall govern the proposed rules of the [PCAOB], as fully as if the Board were a 'registered securities association' . . . . " The referenced provisions provide for notice of such rules to the Securities and Exchange Commission ("SEC"), along with procedures for the promulgation, review, and approval of such rules.

Section 107(c)(2), 15 U.S.C. § 7217(c)(2) states that "[t]he provisions of sections 78s(d)(2) and 78s(e)(1) of this title shall govern the review by the [SEC] of final disciplinary sanctions imposed by the Board . . . as fully as if the Board were a self-regulatory organization and the [SEC] were the appropriate regulatory agency for such organization . . . " The referenced provisions in Section 78s provide for review of "final disciplinary sanctions" by the appropriate regulatory agency for a given self-regulatory organization ("SRO"), including review by any person aggrieved by the sanction. They also set forth the standards under which the appropriate agency should affirm, modify, or set aside the sanction.

Each of the foregoing provisions modifies the relevant provisions in Section 78s to make the standards appropriate for the review of rules and sanctions of the PCAOB.

Although the court below asserted in *dicta* that the statute provides for judicial review of any SEC determination with respect to rules or sanctions, *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 537 F.3d 667, 671 (D.C. Cir. 2008), the statute itself does not provide for any such review. The court below relied on 15 U.S.C. § 78y for its *dicta*, 537 F.3d at 671, but that statute provides only for judicial review of orders "entered pursuant to *this chapter*" (15 U.S.C. § 78y(a)(1) (emphasis added)) and rules "promulgated pursuant to section . . . 78s of this title" (15 U.S.C. § 78y(b)(1)). (Sections 78s and 78y are in Chapter 2A of Title 15; Sarbanes-Oxley is in Chapter 98).

While, as noted above, Sarbanes-Oxley specifically incorporates the *administrative* procedures for SEC review from Section 78s, with some modifications, it nowhere mentions Section 78y. And although Section 78y provides for judicial review of rules and orders promulgated pursuant to Section 78s and other sections in Chapter 2A, it conspicuously does *not* provide for judicial review of rules and orders promulgated pursuant to other sections or chapters, including those that simply use Section 78s and/or Chapter 2A as a *model* for *administrative* review of those rules and orders. Normal rules of statutory interpretation like *expressio unius* would suggest that where, as here, a statute incorporates certain provisions for administrative review, but conspicuously fails to incorporate similar

provisions for judicial review in the courts of appeals, there is no direct judicial review of rules and orders in the courts of appeals. *A fortiori*, those courts do not have exclusive jurisdiction to review orders and rules.

Moreover, since the absence of any specific provision for judicial review in Sarbanes-Oxley hardly suggests an intention by Congress to eliminate all judicial review, for which this Court requires clear and convincing evidence, the district court had jurisdiction. Indeed, the absence of any specific provision for judicial review militates in favor of the conclusion that even the administrative scheme was not intended to be exclusive or primary as to broad constitutional claims, since it is unlikely that Congress would require administrative agencies to waste substantial time addressing constitutional issues for which they have no particular expertise.

Legislative history, although it confirms that Congress intended the general procedures of administrative oversight of SROs by the SEC to apply to the PCAOB, S. Rep. No. 107-205 at 12, 49, says nothing at all about judicial review of the SEC's determinations. It certainly does not support the proposition that the only judicial review of any PCAOB determination is direct review in the courts of appeals from an administrative appeal to the SEC.

Of course, even if the *dicta* regarding

judicial review from the court below were correct, that would only demonstrate, as the court below recognized, that *rules* and *orders* were subject to administrative proceedings followed by direct judicial review in the courts of appeals. Assuming it provided for that, Sarbanes-Oxley itself certainly provides for no other kind of judicial review, and thus its review scheme could hardly be deemed exclusive for challenges not involving orders or rules.[2] Indeed, with respect to the review of inspection reports by PCAOB, the statute specifically *precludes* judicial review of *any* kind. 15 U.S.C. § 7214(h)(2). Given that one of the two petitioners complains primarily about precisely such a report, and the damage that it has caused (*see* J.A. 66 (¶¶ 76-78)), the statute's failure to provide any form of judicial review would otherwise, absent a lawsuit under Section 1331, preclude any review of the injuries that it alleges it has suffered from the constitutional violations identified in the complaint.

So, too, if the PCAOB decided to impose a particularly onerous investigation on an audit firm

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[2] The securities laws do not make all actions of the SEC subject to review only pursuant to Section 78y. *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 690 n.15 (1975) (SEC's rate-setting can be reviewed pursuant to Section 78y or the Administrative Procedure Act); *Occidental Petroleum Corp. v. Securities and Exchange Comm'n*, 873 F.2d 325, 337 (D.C. Cir. 1989) (SEC's determination to disclose documents under FOIA reviewable under Section 706 of the APA in district court).

because its owners were Hispanic (albeit without imposing a formal sanction), the firm would plainly be suffering a constitutional injury. It is hard to believe that, by adopting a review scheme for rules and orders, Congress intended to preclude any judicial remedy for that firm.

Even statutory provisions explicitly precluding judicial review – absent from Sarbanes-Oxley other than the provision precluding judicial review of inspection reports – are interpreted in a way to leave open the kind of broad constitutional challenge being made by petitioners here. For example, in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), the plaintiffs, representing undocumented aliens working in agriculture who wished to obtain amnesty and obtain status as lawfully admitted, challenged the procedures established for that purpose as a violation of due process. The relevant review statute provided for administrative and limited judicial review of "a determination respecting an application for adjustment of status." *Id.* at 486 n.6 (*quoting* 8 U.S.C. § 1160(e)). This Court concluded that "the reference to 'a determination' describes a single act rather than a group of decisions or a practice or procedure employed in making decisions." *Id.* at 492. Thus, "Congress' choice of statutory language" meant that general challenges to the procedures like the one before the Court were not within the scope of the exclusive administrative and judicial review procedures.

Similarly, in *Johnson v. Robison*, 415 U.S. 361 (1974), this Court considered the scope of 38 U.S.C. § 211(a), which provided in relevant part that the determinations of the administrator of the Veterans Administration "on any question of law or fact under any law administered by the [VA] providing benefits for veterans . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision . . . " *Id.* at 365 n.5 (*quoting* 38 U.S.C. § 211(a)). This Court ruled that the best reading of that text would be limited to decisions arising "in the administration by the [VA] of a statute providing benefits for veterans." *Id.* at 367. Examining both the text and the legislative history, the Court concluded that neither provided the necessary "clear and convincing evidence" that Congress intended to restrict access to judicial review beyond the specific terms of the statute. *Id.* at 373-74. Since the constitutional challenge there was to the exclusion of conscientious objectors from veterans' educational benefits, the statute did not preclude district court jurisdiction. *Id.*

In the lower courts, respondents relied heavily on *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). While *Thunder Basin* involved a statutory review scheme, under the Mine Act, the facts there were substantially different. In *Thunder Basin*, a mine operator intentionally ignored its obligation to post the names of designated miners' representatives, in clear violation of a federal regulation. (It argued that

the regulation conflicted with rights it possessed under the National Labor Relations Act and that the administrative process for challenging those regulations violated Due Process.) *Id.* at 204-05. Rather than wait for a sanction to be imposed, it filed suit in District Court, where it obtained injunctive relief against officials of the Labor Department.

The review scheme provided "a detailed structure for reviewing violations of 'any mandatory health or safety . . . regulation promulgated' under the Act." *Id.* at 207 (*quoting* 30 U.S.C. § 814(a)). Examining the statute's language, this Court concluded that the Act did "not distinguish between preenforcement and postenforcement challenges, but applies to all violations of the Act and its regulations." *Id.* at 208-09. The Court noted that the mine owner's claims "are 'pre-enforcement' only because the company sued before a citation was issued." *Id.* at 216. This Court concluded that it ought not reward the mine owner for having raced to the courthouse before the Secretary of Labor could issue a citation for its violation. *Id.*

Here, of course, petitioners did not race to the courthouse ahead of an impending order or sanction that could only be appealed through the administrative process. Indeed, no such order or sanction has issued even to this day. Petitioners do not object to any specific order, but rather the process and cost of having to address the Board's

investigation, and pay the Board's assessment under Section 109(d) of Sarbanes-Oxley (15 U.S.C. § 7219(d)), which petitioners assert flow from a constitutionally-defective process. The statute provides no redress for those injuries, and, accordingly, it does not preclude the current action.

Two other aspects of *Thunder Basin* deserve mention and demonstrate its irrelevance here. First, this Court did, in fact, determine one of the mine owner's due process claims on the merits. *Id.* at 216-18 (rejecting mine owner's claim that it would suffer irreparable harm in the absence of the availability of a pre-enforcement suit in the district court). Second, *Thunder Basin* upheld the general rule that district courts have jurisdiction, notwithstanding a comprehensive review procedure, over claims that are "collateral" to a statute's review provisions and outside the agency's expertise. *Id.* at 212. Surely, that describes petitioners' claims here. Those claims, relating to the formation and structure of the PCAOB, are entirely unrelated to any specific order holding that petitioners violated some rule of the PCAOB involving the audits of public companies or that some rule of the PCAOB is beyond its statutory mandate. Moreover, neither the SEC nor the PCAOB has any expertise in the structural constitutional arguments that petitioners make.

Further, there is no ongoing administrative

procedure in which these claims could be made, and there is no prospect for one. Thus, there is no possibility that respondents could decide some factual matter in a fashion that would moot petitioners' complaint and render a constitutional adjudication unnecessary. Petitioners claim that PCAOB's very existence is constitutionally problematic. No administrative proceeding will ever address that problem.

And, for the same reasons, requiring administrative exhaustion would be pointless. It would be odd, indeed, if Congress required a meaningless exercise before administrative bodies, whose expertise is unrelated to broad Constitutional issues, before permitting the precise same Constitutional challenge in the district court that was made here without that meaningless exercise.

CONCLUSION

For the foregoing reasons, the district court had jurisdiction over petitioners' complaint, and this Court should reach the merits of petitioners' constitutional arguments. For the reasons set forth in petitioners' brief, it should reverse the judgment of the court below.

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,
Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATED OF AMERICA,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia District

Brief of *Amicus Curiae* The Claremont Institute Center for Constitutional Jurisprudence In Support of Petitioners

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QUESTIONS PRESENTED

1. Whether the Sarbanes-Oxley Act violates the Constitution's separations of powers by vesting members of the Public Company Accounting Oversight Board ("PCAOB") with far-reaching executive power while completely stripping the President of all authority to appoint or remove those members or otherwise supervise or exercise control over that power, or whether, as the court of appeals held, the Act is constitutional because Congress can restrict the President's removal in any way it "deems best for the public interest."

2. Whether the court of appeals erred in holding that, under the Appointments Clause, PCAOB members are "inferior officers" directed and supervised by the Securities and Exchange Commission ("SEC") merely because the SEC may review some of the members' work product, where the SEC lacks any authority to supervise those members personally, to remove the members for any policy-related reason or to influence the members' key investigative functions.

3. If the Court of Appeals correctly determined that Act's provision for their appointment by the SEC violates the Appointments Clause either because the SEC is not a "Department" under *Freytag v. Commissioner*, 501 U.S. 868 (1991), or because the five commissioners are not the "Head" of the SEC.

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I

INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that the power of the Executive, as articulated in the Constitution and codified in the separation of powers doctrine and the Appointments Clause, does not allow government to create rogue agencies of far-reaching power outside the accountability owed to the people. The Institute pursues its mission through academic research, publications, scholarly conferences and, via its Center for Constitutional Jurisprudence, the selective appearance as *amicus curiae* in cases of constitutional significance.

The Claremont Institute Center for Constitutional Jurisprudence has participated as *amicus curiae* before this Court in several other cases of constitutional import, including *Elk Grove Unified School District v. Newdow*, No. 02-1624; *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Boy*

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[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been filed previously. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

Scouts of America v. *Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

SUMMARY OF ARGUMENT

The creation and operation of the Public Company Accounting Oversight Board (PCAOB) unconstitutionally violates the separation-of-powers doctrine by vesting Executive powers in a public corporation that is largely immune from Executive oversight. Because policymaking convenience and complicity between Congress and the President does not excuse unconstitutional legislation, we ask the Court to strike down the PCAOB.

Part I closely examines the historical record to prove that the Founding generation clearly would have viewed a body with the powers of the PCAOB as providing an inherently governmental function of a distinctly executive nature. Consequently, the Constitution they crafted would regard the PCAOB as an Executive agency requiring presidential oversight. Part II demonstrates the importance of the President's powers of appointment to his constitutional duty to control the Executive Branch. Part III examines the importance of the appointment power from the perspective of the removal power.

Part IV explains that Congress violated the nondelegation doctrine by delegating powers that it does not possess and therefore may not legally delegate—namely, the Executive powers of appointment and oversight. Finally, Part V delineates the potential pitfalls that may result from

disabling government's oversight of its operations, and therefore government's accountability to the governed.

ARGUMENT

I. THE FOUNDERS FOLLOWED A RICH TRADITION IN POLITICAL PHILOSOPHY WHEN INCORPORATING SEPARATION OF POWERS PRINCIPLES INTO THE CONSTITUTION

Our Founding Fathers established a constitutional republic based upon the rule of law, expressly not the rule of shadowy committees beyond the scrutiny and reach of the citizenry. The very structure of the PCAOB with its attenuated oversight violates both the spirit and the letter of the Founders carefully crafted tripartite system of government designed according to a transcendent rule of law.

Beginning with ancient Greece there was a sense that political power should originate from a body of law that was above men who had potential for corruption and capture. "Political power must . . . reside in institutions, offices, laws and procedures that transcend any one man or group of men, . . . These compose a 'common thing' (*koinonia*) in which each citizen is a partner, and they function not through brute force but through reason and persuasion. The institutions of government must be available and beneficial to all citizens." Bruce Thornton, *Greek Ways: How the Greeks Created Western Civilization* 121 (Encounter Books 2000). As Aristotle observed "governments which regard only

the interest of the rulers are all defective and perverted forms, for they are despotic." *Id.*

When constitutional constraints are side-stepped and the mandated linkage between government agency and its assigned authority is broken, the result renders the law questioned and without authority. When George Washington discussed ratifying-era constitutional controversies with eventual Supreme Court Justice Bushrod Washington, he affirmed that "the power under the Constitution will always be with the people" when correcting power "exercised contrary to their interests." Letter from George Washington to Bushrod Washington (Nov. 1787), *in George Washington: Writings* 661 (John H. Rhodehamel ed., Library of America 1997).

The Founders wisely designed a system of separated power with final authority residing in the "censorial power of the people, which is in effect a branch of the sovereign power itself. St. George Tucker, *View of the Constitution of the United States* 48 (The Liberty Fund 1999). However, this citizen oversight is contingent upon the constitutionally prescribed connection between the people and government officials. Blackstone described government "ministers" as "trustees or agents" of the people since the people "ought to do, themselves, whatever they conveniently can; [and] that, what they can not do of themselves, must be committed to the management of ministers chosen by themselves; . ." 2 St. George Tucker, *Blackstone's Commentaries* 174 (Law Book Exchange 1996).

Yet, when these "ministers" abuse power, the citizenry have as their rightful recourse elective leverage. Therefore, the Chief Executive, as the official in charge of subordinate appointees, must have direct and unobstructed ability to review and correct the activities of committees fulfilling the roles of appointed agents. Tucker knew the necessity of citizen oversight, even if through the Executive, when he called the representative who dared to openly violate his duty "bold and desperate" when "he knows himself amenable to the people for such a breach of trust." Tucker, *View of the Constitution, supra*, at 48.

In creating the PCAOB Committee Congress worked to produce an opaque and unaccountable body removed from proper Executive correction and citizen scrutiny. St. George Tucker warned that if the people were to remain sovereign, the citizenry must have the ability to censor the agent "that forgets his responsibility." *Id.* He predicted that where the vigilance and attention of the people is wanting, "usurpation is often as little perceived as that of a star, rising in the east whilst the sun is in the meridian." Tucker anticipated incremental power transfers, but found them particularly insidious because they are difficult to detect and easy to rationalize. *Id.* at 49.

Beyond citizen vigilance, the Founders realized the need for "auxiliary precautions" as taught by mankind's experience with what Washington delicately called the "defect of better motives." "[Opposite and rival interests" were thus introduced

to "divide and arrange the several offices in such a manner as that each may be a check on the other; . . ." *The Federalist No. 51*, at 337 (James Madison) (The Modern Library 1980). Justice Story wrote that "free institutions [have] ever been found essentially to depend . . . [on] a system of checks and balances." He endorsed the corrective influence of "distributing the power among different branches, each having a check upon the other." 1 Joseph Story, *Commentaries on the Constitution of the United States* 378 (William S. Hein & Co., Inc. 1994) (1891). George Washington was confident that the separated powers were "so distributed among the Legislative, Executive, and Judicial Branches . . . that it can never be in danger of degenerating into any [other] despotic or oppressive form." Letter from George Washington to Marquis de Lafayette (Feb. 1788), *in Washington*, *supra*, at 668.

The Framers of our Constitution thus paid heed to the wisdom of Baron de Montesquieu and organized a separated, balanced, and accountable government structure designed to expose the people's business to citizen judgment. Through the tripartite system of government they designed, they intentionally inhibited the exercise, and therefore the abuse of power: "But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits? To prevent this abuse, it is necessary from the very nature of things that power should be a check to power." Baron de Montesquieu,

The Spirit of the Laws 150 (Thomas Nugent trans., Hafner Pub. Co. 1949). "No man is a warmer advocate for *proper* restraints and *wholesome* checks in every department of government than I am." Washington, *supra*, at 662 (emphasis in original). "That the Legislative, Executive, and Judicial powers, should be separate and distinct, in all free governments, is a political fact, so well established , . . that no country ever did, or ever can long remain free, where they are blended." John Dawson, June 1788 Virginia Convention Speech, *reprinted in* 2 THE DEBATE ON THE CONSTITUTION 746 (Bernard Bailyn ed., Library of America 1993).

The Founders knew that a successful constitutional republic must rise above ministerial lawmaking. They understood that for liberty to thrive, power must be diffused and counterweighted. Thomas Jefferson recommended that "powers of government should be so divided and balanced among several bodies of magistry, as that no one could transcend their legal limits, without being effectually checked and restrained by the others." Letter from Thomas Jefferson to Benjamin Rush (Sept. 23, 1800), *in* Akhil Amar, *America's Constitution* 60 (Random House 2005). Indeed, Madison argued that "the constant aim" of our Constitution is to vest each member of our government with a personal interest in preventing encroachment by members of opposing branches so that "the private interest of every individual may be a sentinel over the public rights." *The Federalist No. 51*, at 337 (James Madison) (The Modern Library

1980). Ultimately, power had to be "divided, subdivided, and distributed into so many separate channels" so that it would not rush down "in one single torrent, overwhelming and sweeping away whatever it encounters in its passage." Tucker, *View of the* Constitution, supra, at 48.

II. The Framers Intended Executive Oversight and Control over PCAOB-Type Agencies.

The Public Company Accounting Oversight Board (PCAOB) was established "in order to protect the interests of investors and further the public interest in preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to, and held by and for, public investors." 15 U.S.C.A. § 7211(a) (West Supp. 2004). With this language PCAOB was established as a watchdog agency to combat accounting fraud and management negligence, the revelation of which resulted in the demise of Enron and WorldCom. However, this oversight agency's structure essentially creates an ironic environment for oversight since the Board whose mission is to restore accountability to America's business market is not itself accountable to the chief executive. Without any accountability, the PCAOB may be susceptible to abuse of its rulemaking and disciplinary functions. Even worse, if not checked this model will surely serve as a prototype for similar agencies.

Created by the Sarbanes-Oxley Act of 2002, the PCAOB sets auditing standards for the auditors of

public companies. The PCAOB functions as a rule maker, adjudicator and disciplinarian. While functioning like an executive agency that also has legislative and judicial powers, the committee's five members are not appointed by the President but by five commissioners of the Securities and Exchange Commission (SEC), which is in turn significantly independent of the President. Another feature of this committee, causing it to function like an *independent* executive committee, is that the five members are removable only for cause by the SEC, and not at will. This organizational characteristic causes PCAOB to be two steps removed from accountability to the Chief Executive.

Even with Congress labeling PCAOB as a "private nonprofit corporation," rather than the government agency it seems to be, it is likely that under this court's holding in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), Congress's best efforts to keep PCAOB private will be unavailing. In *Lebron*, the court introduced a three-prong test to determine whether a private entity was indeed the government itself. The three-prong test involves an inquiry into: (1) whether the government created the entity, (2) whether the government created the entity to further governmental objectives, and (3) whether the government retains permanent authority to appoint a majority of the directors.

There is little analysis necessary to determine that PCAOB satisfies all three-prongs in *Lebron*. PCAOB was created by Congress in Title I of

Sarbanes-Oxley. The objectives of the PCAOB are far more governmental than those of the entities involved in any of the prior cases presented to the courts. The language of the statute that created the PCAOB describes that PCAOB's mission is to protect "the interests of investors and furthering the public interest in the preparation of reliable audit reports." Additionally, PCAOB's rulemaking, enforcement, and adjudicative powers are quintessentially governmental powers. Finally, Title I additionally grants the SEC (a government agency) the power to appoint all five members so long as PCAOB is in existence. Therefore, despite Congress' best efforts to label PCAOB as a private entity, available case law indicates otherwise.

Additionally, although the Court of Appeals held that the PCAOB board members were considered "inferior officers," the holding in *Edmond v. United States*, 520 U.S. 651 (1997), strongly suggests otherwise Although this court did not firmly establish a set of criterion in analyzing whether an individual should be considered an "inferior officer," the court did indicate that the level of supervisory authority should be the primary indicia. *Id.* at 1583. Unlike *Edmond*, where the court found military judges to be "inferior officers," the PCAOB operates under far less supervisory control. The PCAOB board members are not removable without cause,[2]

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[2] The court stated that "the power to remove officers...is a powerful tool for control. *Id.* at 1581. As has been stated so many times, the SEC is unable to remove PCAOB board members without cause, thus stripping the SEC of this "powerful tool for control."

are able to initiate investigations and make rulings without the consent of the SEC and were vested with vast regulatory powers. This lack of SEC supervisory control over the PCAOB makes the ruling below that the PCAOB board members are "inferior officers" at odds with *Edmond*.

A. PCAOB (Deconstructed)

Section 101 of Title 1 establishes and delineates the Board's principal responsibilities. It states:

> (a) ESTABLISHMENT OF BOARD.- There is established the Public Company Accounting Oversight Board, to oversee the audit of public companies that are subject to the securities laws, and related matters, *in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports* for companies the securities of which are sold to, and held by and for, public investors. The Board shall be a body corporate, operate as a nonprofit corporation, and have succession until dissolved by an Act of Congress.

15 U.S.C.A. § 7211(a) (West Supp. 2004) (emphasis added).

Upon a reading of this section it becomes apparent that Congress intended that this "private

non-profit corporation" would also be vested with an inherently government mission. In order to accomplish this government mission, PCAOB was granted far-reaching power that it has exercised since its inception without any accountability to the chief executive.[3]

PCAOB's extensive power is evidenced upon a review of their rulemaking and disciplinary functions. Section 103 of Title I establishes the PCAOB as the primary standard-setter for auditors, requiring the PCAOB to promulgate rules establishing the auditing and related attestation standards, quality control standards, and ethics standards to be used by registered firms. *Id.* The PCAOB has used this power to complicate compliance requirements with vague language and statutory additions that add nothing to investor security aside from burdening auditors and their associated individuals.

Included in the PCAOB's power to create rules and standards for auditors is its broad authority to grant exemptions to any person, issuer, public accounting firm, or transaction. 15 U.S.C.A. §

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[3] Even supporters of the bill like Senator Phil Gramm recognized the significant governmental powers that were being bestowed upon PCAOB: "This board is going to have massive power, unchecked power, by design...We are setting up a board with massive power that is going to make decisions that affect all accountants and everybody they work for, which directly or indirectly is every breathing person in the country. They are going to have massive unchecked powers." Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 Notre Dame L. Rev. 971, 1003 (2005) (quoting 148 Cong. Rec. S6334 (Sen. Gramm)).

7214(b)(1)(B). The only qualifier to the PCAOB's exemption power is the requirement that "the exemption is necessary or appropriate in the public interest." *Id.*

Section 105 of Title 1 grants the PCAOB broad authority to conduct investigations and impose discipline. This includes an authorization to investigate any act, practice, or failure to act, by any registered firm, or its associated persons that may violate Sarbanes-Oxley, rules of the Board or provisions of the securities laws. *Id.* § 7215(b)(1). Pursuant to its investigatory powers, the PCAOB may require testimony or production of documents from both registered firms and their associated persons as well as the clients themselves. Should there be a refusal to cooperate the Board can elect to seek a subpoena or levy fines. *Id.* § 7215(b)(2)(D).

Should the PCAOB find a violation, the PCAOB has a wide array of disciplinary actions at their disposal, including: censure, required additional professional education, temporary suspension, permanent revocation, limitation on activities and civil monetary penalties (this includes fines for both intentional and un-intentional violations). *Id.* § 7215(c) (4)(F).

In addition to the costs imposed by disciplinary actions, Congress authorized PCAOB to fund itself through the assessment of "accounting support fees" paid by public companies, imposing even more direct costs. Moreover, in addition to these fees and fines, PCAOB's constant tightening of the rules and regulations have imposed high compliance and

regulatory costs on both registered firms and individuals. A recent study performed by the University of Rochester, estimates that the annual costs of the Board's rules are over $35 billion. American Electronics Association, *Sarbanes-Oxley Section 404: The 'Section' of Unintended Consequences and Its Impact on Small Businesses*, February 2005, *Available at* http://www.aeanet.org/governmentaffairs/AeASOXPaperFinal021005.asp.

These high costs ~~to~~ the public have been attributed to the mountain of red tape that the PCAOB is charged with creating and its broad interpretation of Sarbanes-Oxley's rules on what constitutes "internal controls." It is these powers that have caused the PCAOB to reward the big accounting firms with unreasonably complex and costly compliance regulations that only they can handle. This has essentially made small accounting firms irrelevant and unable to compete. Even former Congressman Michael Oxley (one of the namesakes of Sarbanes-Oxley) has recognized the problem, noting that the original bill "was two paragraphs long, but by the time the PCAOB was done, it was 330 pages of regulations. It was far too prescriptive and [more] expensive than anyone anticipated." Steven Taub, *Oxley: I'm Not Happy with Sarbox*, CFO.com, April 6, 2007, *available at* http://www.cfo.com/article.cfm/8985156/c_8985869.

As presently organized, with massive budgets and far-reaching powers, PCAOB is the type of government agency that the Founders intended to be

directly overseen by the Executive. Any branch that can level penalties upwards of $2 million for unintentional violations and over $15 million for intentional violations, *see* 15 U.S.C. § 7251(c)(4)(D)(i), has too much power without any accountability to the public upon which is is imposing such burdensome time and financial costs.[4] As Senator Gramm so bluntly stated, PCAOB affects "every breathing person" in the United States and should therefore be held accountable to the Executive and thus to the public.

III. The Power of Appointment was Given to the Executive to Aid in Execution of Presidential Duties.

A. Executive was to have unitary authority to speak on behalf of government.

The Framers understood the need for a "strong executive" in the areas of both foreign affairs and domestic administration. "[A]fter a controversial discussion the executive power of the government was vested in one person and many of his important functions were specified so as to avoid the

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[4] It is also worth noting that in 2008, PCAOB Chairman Mark Olson earned an annual salary of $654,406 with the remaining four members receiving $531,995 annually. These salaries are significantly higher than those earned by members of Congress as even by the President of the United States, further demonstrating the necessity of accountability to the chief executive and through him to the public.

humiliating weakness of the Congress during the Revolution and under the Articles of Confederation." *Myers v. United States*, 272 U.S. 52, 117-18 (1926), *quoting* 1 Max Farrand, *Records of the Federal Convention of 1787* 66-97 (1911). Because the President was to speak with a voice of authority on foreign policy matters and to lead in setting domestic priorities, Article II simply begins with a simple but comprehensive assignment of executive power to the President: "The executive Power shall be vested in a President of the United States of America." U.S. Const., Art. II, Sec. 1.

Several states had experimented with executive councils and abandoned the idea in favor of a single executive magistrate. They recognized, as Justice Story would later note, that "a council often becomes the means, either of shifting off all effective responsibility from the chief magistrate, or of intrigues and oppositions, which destroy his power, and supplant his influence." Story, *Commentaries*, *supra*, at 288. Legal commentator James Kent also noted the failed experience in states that tried to govern by council:

> Unity increases not only the efficacy, but the responsibility, of the executive power. Every act can be immediately traced and brought home to the proper agent. There can be no concealment of the real author, nor, generally, of the motives of public measures, when there are no associates to divide or to mask responsibility. There will be much less temptation to depart from duty, and much

> greater solicitude for reputation, when there are no partners to share the odium, or to communicate confidence by their example. The eyes of the people will be constantly directed to a single conspicuous object; and, for these reasons, De Lolme (a) considered it to be a sound axiom of policy, that the executive power was more easily confined when it was one. "If the execution of the laws," he observes, "be entrusted to a number of hands, the true cause of public evils is hidden.

James Kent, COMMENTARIES ON AMERICAN LAW 291 (Oliver Wendell Holmes ed., Rothman & Co. 12th ed., 1989) (1873).

The Framers vested executive authority in the President for purposes of unity, consistency, and accountability. The President may choose to delegate some responsibilities to agencies over which he has direct oversight but it is clear that the Framers did not intend that boards and committees fulfill Executive functions while entirely removed from Executive supervision. This practice results in exactly the "government by council or committee" that the Framers expressly rejected. *See* Amar, *supra*, at 197 ("What Article II did make emphatically clear from start to finish was that the president would be personally responsible for his branch.")

B. The President was given appointment powers for the purpose of delegating some administrative duties while retaining accountability.

The president as Chief Executive is charged in Section 2, with the power of appointing superior officers: He shall have Power, . . . and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, . . . and all other Officers of the United States." U.S. Const., Art. II, Sec. 2. Justice Story called the power of appointment "one of the most important and delicate in a republican government" and warned that it could become "one of the most dangerous engines to destroy private independence and public liberty, which can assail the public." While Story spoke of these dangers he also commended the Framers for installing safeguards against the abuse of power like the Senatorial advice and consent feature. Joseph Story, *A Familiar Exposition of the Constitution of the United States* 218 (Regnery Gateway 1986) (1865).

This Court evaluated the Framers' words and intentions when contemplating presidential appointment duties in *Myers v. United States*. Chief Justice Taft's exhaustive study led him to conclude, for the Court, that although the President was obliged to "faithfully execute the laws," he could not personally attend to all aspects of his duties, so "the reasonable implication, even in the absence of express words, was that as part of his executive

power he should select those who were to act for him under his direction in the execution of the laws." Myers, *272 U.S. at 118-119. See also Wilcox v. Jackson ex dem, McConnel*, 38 U.S. (13 Pet.) 498, 513 (1839); *United States v. Eliason*, 41 U.S. (16 Pet.) 291, 302 (1842); *Williams v. United States*, 42 U.S. (1 How.) 290, 297 (1843); *Cunningham v. Neagle*, 135 U. S. 1, 63 (1890); *Russell Motor Car Co. v. United States*, 261 U. S. 514, 523 (1923); and Blackstone ("The constitution of the United States has made ample provision for [the Executive's] aid in these respects, by assigning to him ministers to whom the conduct of each of the executive departments may be committed . . ." Tucker, *Blackstone, supra*, at 319.

The very idea of creating a regulatory board to monitor compliance with federal laws, yet operating two steps removed from Executive authority, would have been completely inconsistent with founding era aims to institutionally frustrate isolated and opaque power centers. Blackstone cautioned that power and authority should be delegated with an eye to accountability and trust writing "that the choice of ministers may be made, either, personally, by the whole body of the people; or by their deputies, chosen for that especial purpose, and in whom they can repose a proper confidence." *Id.*

Blackstone accurately and presciently identified the exact issue presented in the PCAOB executive-in-nature, but not executive-in-accountability, committee when he exposed the due concern given "numerous boards" resulting in "divided responsibility" until "it is entirely lost, and where the

chance of unanimity lessens in geometrical proportion to the number that compose it." *Id.* What Blackstone, Justice Story and the Framers recognized was that the lessening of unanimity, or unity, resulted in the attendant lessening of accountability since spotting a person designated with responsibly to the electorate is obviously more difficult for each layer of decision-making and each additional horizontal committee member.[5]

IV. Removal Power is an Integral Part of Executive Authority

Records reflecting founding and ratifying era discussions on presidential power to *remove* appointees are scarce. The logical reason for the attention to appointment protocols but not the same emphasis on removal procedures is that Framers expected executive removal power to stem from the President's authority to appoint superior officers.

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[5] As to the claim that PCAOB officers are inferior or that their duties do not rise to a level requiring Executive direction. We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States," *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). They may, therefore, properly perform duties only in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not "Officers of the United States." *Id.* at 139]

A. Removal power derives from Section II authority.

The construction of PCAOB so that officers are removed, not by the Executive, but by appointed members of the SEC who are themselves significantly insulated from presidential oversight, is the most glaring violation of constitutional intent at issue in this case. This organizational feature contradicts the monumental ruling in *Myers v. United States*, 272 U.S. 52 (1926), where the court held that the President possesses a constitutional right under Article II to remove executive officials without cause.

One congressional debate is recorded that reveals early understanding of the Executive's removal power. According to Professor Saikrishna Prakash, who investigated the removal question for the authoritative Documentary History of the First Federal Congress, the seminal congressional "Decision of 1789" vindicates exclusive Presidential authority to remove appointees. Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021, 1022 (2006).

While the final vote on the source of Executive Removal Power was split between a group that found the authority as emanating from the President's Executive Office and those that recognized a power reciprocal to the Appointment Power, the discussion in 1789 reveals that "the first Congress concluded that the Constitution's grant of executive power authorized the President to remove executive

officers" according to the actions and writing of men like:

Alexander Hamilton, writing as: Pacificus in 1793, had no doubt that the first Congress had endorsed the executive-power theory. Similarly, Chief Justice John Marshall, in his biography of George Washington, claimed that the Decision 'has ever been considered as a full expression of the sense of the legislature' that the Constitution granted the executive removal authority. William Howard Taft, the only Chief Justice to have also served as Chief Executive, read the Decision of 1789 in a similar vein. *Id.* at 1023-1024.

Professor Prakash offers additional proof in the actions of subsequent Presidents who demonstrated confidence that they had the power to remove officers by virtue of the Constitutional authority. Washington removed 23 officers, Adams 27, and Jefferson 124. These Presidents apparently did not cite the Decision of 1789 as the basis for these removals, so it is possible that each of them concluded that they had a constitutional removal power independent of the Decision of 1789. In any event, there is no evidence that anyone challenged these Presidents' removals despite the fact that no statute authorized them. *Id.* at 1066-1067.

At least one clear reference to the presumptive nature of executive removal authority was made during the ratification debates: "If there is a total Silence in the Constitution, is it not natural to conclude that an Officer holding during Pleasure is removable by the same Power which appointed him,

whether vested in a single Person, or a joint Number? . . . But in the Removal of Officers the President has not a Constitutional Council. *He must therefore be solely accountable.* Letter from Samuel Adams to Henry H. Lee (Aug. 29, 1789), *available at* http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s47.html (emphasis added).

When Justice Story wrote on the removal power he also cited the practice of President George Washington. Acknowledging the Constitution's silence on the subject, he attributed the doctrine of Executive removal to "just deference" to the "great man" and he observed that the practice of the President exercising the power of removal prevailed "without any restraint from the Senate." Story, *Familiar Exposition, supra*, at 219.

While the Court of Appeals' majority opinion viewed the removal issue in this case in a rather simple light under existing precedent, as Judge Kavanaugh correctly noted in his eloquent dissent, there is actually a great deal of difference between the present case and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Mainly, the difference lies in the fact that the officials of the independent agencies at issues in *Humphrey's Executor* were removable for cause *by the President*, whereas members of the PCAOB are removable for cause only by *another independent agency*. It is this essential difference that places the President two levels of for-cause removal away from the PCAOB's Board members, a previously unheard of restriction on the

President's authority over executive officers. Therefore, rather than being *Humphrey's Executor* redux, as the majority below claimed, this case should rather be referred to as *Humphrey's Executor* squared. It is this unique characteristic of PCAOB's organization that places it beyond the bounds of *Humphrey's Executor* and instead into a realm all its own.

B. Separation of powers precludes distance between executive and administrative agencies.

The Founders created a government divided into three branches of accountable power: each checking the other and each responsible to the people. Within those branches, there was expressly not to be separation between officials and the people.

When this Court astutely analyzed and applied founding philosophy and constitutional debates in *Myers v. United States*, 272 U.S. 52 it performed the most comprehensive historical treatment ever given to legal analysis of the Executive's appointment and removal power. *See, generally, Myers*, 272 U.S. at 106-239. In *Myers* the Court found that legislative power was encroaching on Presidential prerogatives to unilaterally remove an executive branch official This reasoning was then applied in *Springer v. Government of Philippine Islands* when the Court defined the distinction between legislative and executive delegation functions as follows:

> Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.

Springer v. Government of Philippine Islands, 272 U.S. 189, 202 (1928).

The reason for this clear distinction cannot be lost in the vagueries of classifications and job titles. The Founders feared one thing above all else and that was tyranny. This theme is found repeatedly in early separation of powers discussions and attention to it remains an important aspect of our constitutional system of government. For the Founders, liberty was only as safe as the protections installed to resist tyranny. "[T]he Court has explained time after time that the separation of powers protects not simply the office and the officeholders, but also individual rights. As Justice Kennedy has stated, 'Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 714 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *quoting Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

See also Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991) ("The ultimate purpose of this separation of

powers is to protect the liberty and security of the governed."); *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (separation of powers is "essential to the preservation of liberty"); *Bowsher v. Synar*, 478 U.S. 714, 721-22, 730 (1986) (separation of powers is "critical to preserving liberty"); *INS v. Chadha*, 462 U.S. 919, 963 n.4 (1983) (Powell, J., concurring in judgment) (discussing concern that "Congress is exercising unchecked judicial power at the expense of individual liberties" and stating it was "precisely to prevent such arbitrary action that the Framers adopted the doctrine of separation of powers"); *see also* Tucker, *View of the Constitution*, *supra*, at 48 (noting that the people had a responsibility, through their governmental agents, to "be sure to take part against those who would usurp either the rights of the people, or the proper functions of another agent:...as it is also the people who will preserve the several branches of the government within their due limits'").

V. PCAOB Also Suffers From Serious Non-delegation Problems.

Creation of the PCAOB has also violated the non-delegation doctrine because the agency it created represents a congressional delegation of a power Congress does not possess. Specifically, Congress has delegated executive power to a public corporation, yet it has deprived the President of his Constitutional mandate to appoint and supervise this *de facto* executive agency. Although the Court

rarely finds a non-delegation doctrine problem, it has recognized that Congress may not delegate powers it does not possess.

This Court has long held that the primary criterion for congressional delegation of decision-making authority to federal agencies requires enumeration of "an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). Congress has historically faced little difficulty complying with this elastic standard because all but two delegations of its powers have survived judicial scrutiny. See *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

However, this broad rule presupposes that Congress actually possesses the power it wishes to delegate. This Court has recognized that Congress may not delegate powers it does not possess. For example, the Court would not have upheld the delegation of sentencing guidelines to the Judicial Branch if Congress had trespassed against another Branch's constitutional powers. The Court held that "Congress may delegate to the Judicial Branch non-adjudicatory functions that *do not trench upon the prerogatives of another Branch* and that are appropriate to the central mission of the Judiciary." *Mistretta*, 488 U.S. at 388 (emphasis added).

Indeed, the Court has made it clear that delegations of authority may not usurp the powers constitutionally vested in other branches. Chief

Justice Taft wrote for the Court in *J.W. Hampton* that a delegation is unconstitutional "if by law it attempts to invest itself or its members with either executive power or judicial power." *J.W. Hampton*, 276 U.S. at 406. Faithful extension of this doctrine also prevents Congress from creating a nongovernmental agency vested with Executive power, yet unsusceptible to Executive oversight. Moreover, the Court stated in *Loving v. United States* that "it remains a basic principle of our constitutional scheme that one branch of the government may not intrude upon the central prerogatives of another." 517 U.S. 748, 757 (1996), citing *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 225—26 (1995).

Contrary to this long established rule, Congress has "trenched upon the prerogatives of" the Executive Branch by insulating the Board members—who are performing an executive task—from presidential scrutiny. The Constitution explicitly states that the executive power is vested in the President, so Congress lacks the authority to restrict presidential oversight of this *de facto* executive agency.

This case therefore uniquely implicates the non-delegation doctrine not through the typical avenue of Congress granting too much legislative power to the Executive, but rather by depriving the President of his constitutional authority to manage the Executive Branch. This is precisely the delegatory "trench[ing] upon the prerogatives of another Branch" that *Mistretta* forbids, 488 U.S. at 388; and the delegatory

"invest[ment] of Executive powers that *J.W. Hampton* prohibits. 276 U.S. at 406.

This transgression yields the same substantive result as a textbook separation of powers problem, but is cloaked in the form of a seemingly benign delegation. Congress purportedly provides a new means of financial regulation replete with Executive power, yet it lacks any genuine accountability to the Executive. In this sense, the PCAOB delegation is a Trojan horse that promises executive power, yet deprives the executive of oversight.

VI. Policy Arguments Against PCAOB-Type Agencies.

The creation of PCAOB has essentially established a previously unknown realm of regulators. The new public/private regulator is public for purposes of rights, liberties and structures protected by the Constitution and private for purposes of accountability. By labeling PCAOB a private agency, Congress was able to circumvent the statutory obligations and protections that apply to the federal government. This in turn has made private/public regulators less accountable to the public, their actions less transparent and their policy less legitimate than their purely public counterparts. Further, a private/public regulator with policy making power such as PCAOB possesses significantly lessens Congress' and the President's own accountability to the public because it blurs

responsibility for unpopular or unsuccessful decision-making.

PCAOB's lack of an accountable structure has likely contributed to what members of both parties see as its policy failures. For example, as U.S. Senator John Kerry (D-MA) has noted, during most of the six years since its creation, PCAOB has hurt legitimate entrepreneurial companies by stretching the term "internal control" in Sarbanes-Oxley's section 404 to company minutiae that had no relevance to investors.

The massive amounts of red tape imposed by PCAOB have both parties expressing dismay at the increased costs of smaller companies going public, especially at a time when growth capital is so hard to come by. In an effort to cure theses concerns over PCAOB policy, Senator Kerry has called for a task force to "make it easier for small businesses to comply with the Sarbanes-Oxley by reducing their regulatory burden." Kenneth W. Star, *The PCAOB: An Obstacle to President Obama's Success*, The Wall Street Journal, May 13, 2009, *available at* http://online.wsj.com/article/SB124216925017912671.html. But that problem is merely a symptom of the separation of powers problems that lie at the root of PCAOB, and for that, we already had a brilliant task force: the constitutional convention of 1787. Compliance with *that* task force's report, the Constitution, would cure the root problem rather than merely tinkering at symptomatic edges.

CONCLUSION

Our framers bequeathed to us a brilliant constitutional structure, designed to allow government to function within separation of powers constraints that would at the same time prevent it from becoming tyrannical. The structure of PCAOB so clearly violates those most basic of constitutional constraints that it should be held to be unconstitutional.

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AMICUS CURIAE BRIEF

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FREE ENTERPRISE FUND
AND BECKSTEAD AND WATTS, LLP, PETITIONERS

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE COALITION FOR FAIR LUMBER IMPORTS AS AMICUS CURIAE SUPPORTING PETITIONERS

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In the Supreme Court of the United States

No. 08-861

FREE ENTERPRISE FUND
AND BECKSTEAD AND WATTS, LLP, PETITIONERS

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD,
ET AL.

ON WRIT OF CERTIORARI
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE COALITION FOR FAIR LUMBER IMPORTS AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICUS CURIAE

The Coalition for Fair Lumber Imports (Coalition) is an alliance of large and small producers of softwood lumber from across the United States. It was formed in 1985 out of concern regarding Canadian lumber subsidies and their effects on the American lumber industry. The Coalition's aim is to address Canada's unfair trade practices involving softwood lumber, including the gross underpricing of timber used to produce that lumber. In the face of Canada's trade practices, the American lumber industry has had little choice but to assert its rights

under domestic trade laws. The Coalition's ultimate goal is to ensure full and fair competition in the American lumber market, free of the undue advantages currently enjoyed by Canadian lumber producers.

SUMMARY OF ARGUMENT

The Coalition agrees with petitioners that, by vesting the authority to appoint members of the Public Company Accounting Oversight Board in the Securities and Exchange Commission, Congress violated the Appointments Clause. The Coalition files this brief to bring to the Court's attention another context in which Congress has acted in a manner that raises analogous, and in some respects even more serious, constitutional concerns.

Pursuant to the terms of the North American Free Trade Agreement (NAFTA), Congress implemented an alternative dispute resolution system for decisions concerning the imposition of duties on goods imported from Canada and Mexico. The Court of International Trade, an Article III tribunal, ordinarily reviews the determinations of the Department of Commerce and the International Trade Commission concerning the imposition of duties. In NAFTA, however, Congress reassigned that authority to binational panels consisting of members appointed both by the United States and by the affected foreign government. Those binational panels are required to apply (and interpret) American law. Yet their

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* Pursuant to Rule 37.6, the Coalition affirms that no counsel for a party authored this brief in whole or in part, and that no person other than the Coalition, its members, or its counsel made a monetary contribution to fund its preparation or submission. The parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office.

decisions are binding and ordinarily unreviewable by any Article III court.

As a preliminary matter, to the extent that binational panels perform a judicial function, the NAFTA binational panel review system violates Article III. The panel system effectively allocates a judicial function to a non-Article III (and, indeed, non-domestic) tribunal, and then prohibits Article III courts from reviewing the actions of that tribunal. That system violates Article III under any standard, because it reserves none of the essential attributes of judicial power to Article III courts and because binational panels exercise all of the essential jurisdiction and powers that Article III courts ordinarily do. The practical effect of NAFTA is to create a two-track judicial system, under which challenges to duty determinations involving NAFTA signatories are reviewed by binational panels and challenges involving other nations are reviewed by the Court of International Trade. There is no valid justification for Congress's decision to outsource judicial authority in this manner.

To the extent that binational panels are better understood to perform an *executive* function, the NAFTA binational panel system raises Appointments Clause concerns comparable to those at issue in this case. In fact, the panel system fails the Appointments Clause at an earlier step of the analysis, because panel members need only qualify as "Officers of the United States" in order to render the system unconstitutional. In determining whether an individual constitutes an officer of the United States for Appointments Clause purposes, this Court has adopted a functional approach, focusing on whether the individual exercises significant authority pursuant to the laws of the United States. Binational panel members readily satisfy that standard, because they review the determinations of components of the Executive Branch,

apply American law, and issue binding and unreviewable decisions. A contrary view would lead to nonsensical results, because it would suggest that members of an entity with the power to review determinations that are made by principal officers would not even qualify as inferior officers themselves. That cannot be the law. And it is clear that, if panel members are officers of the United States, the panel system does not comply with the Appointments Clause's requirements, because two, and possibly three, members of each panel are appointed not by the President, a Court of Law, or a Head of Department, but rather by a foreign government.

The historical practice of submitting disputes to international arbitral panels with foreign members does not counsel in favor of a different result. There is simply no precedent either for delegating the application of American law to an international tribunal, or for reassigning to an international tribunal preexisting claims against private parties. In invalidating the Public Company Accounting Oversight Board, therefore, the Court should signal that the NAFTA panel system raises similar, and serious, constitutional concerns.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY HOLDING THAT, AS CURRENTLY CONSTITUTED, THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD IS CONSISTENT WITH THE APPOINTMENTS CLAUSE

The Coalition agrees with petitioners that, by vesting the authority to *remove* members of the Public Company Accounting Oversight Board (Accounting Board or Board) only in the Securities and Exchange Commission (SEC) and not directly in the President, Congress violated the separation of powers more generally. See Pet. Br. 11-43. As is relevant here, however, the Coalition

further agrees with petitioners that, by vesting the authority to *appoint* Board members in the SEC, Congress also violated the Appointments Clause more specifically. See *id.* at 43-62.

A. The Appointments Clause is one of the Constitution's foundational provisions concerning the separation of powers, because "the President alone and unaided could not execute the laws" but "must execute them by the assistance of subordinates." *Myers* v. *United States*, 272 U.S. 52, 117 (1926). The Appointments Clause was "designed to preserve political accountability relative to important Government assignments." *Edmond* v. *United States*, 520 U.S. 651, 663 (1997). It provides the President with the sole authority to appoint, with the advice and consent of the Senate, all "Officers of the United States." U.S. Const. Art. II, § 2, cl. 2. For reasons of administrative convenience, however, it carves out an exception for the appointment of "inferior Officers," authorizing Congress to vest the appointment of those officers in, *inter alios*, the "Heads of Departments," without any need for presidential nomination or Senate approval. *Ibid.*

B. It is undisputed that Accounting Board members are "Officers of the United States"—and, for that reason, the sole Appointments Clause issue in this case is whether they are inferior officers (and therefore can validly be appointed by SEC commissioners, at least to the extent that SEC commissioners constitute "Heads of Departments") or whether they are principal officers (and therefore must be nominated by the President and confirmed by the Senate). As this Court has noted, "the line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn." *Morrison* v. *Olson*, 487 U.S. 654, 671 (1988). More recently, however, the

Court explained in *Edmond* that inferior officers are "officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." 520 U.S. at 663.

Under the test of *Edmond*, Accounting Board members are principal officers, because their work is not directed and supervised by Senate-confirmed officers. The primary functions of the Board are to promulgate rules (including professional standards) for accounting firms that audit publicly traded companies, see 15 U.S.C. 7213(a)(1); to conduct investigations of any accounting firm that violates those rules (or any provision of the Sarbanes-Oxley Act or the securities laws), see 15 U.S.C. 7215(b)(1); and to impose sanctions for violations as it deems appropriate, see 15 U.S.C. 7215(c)(4).

Although SEC commissioners are responsible for appointing Accounting Board members in the first instance, see 15 U.S.C. 7211(e)(4), they do not direct or supervise the Board's work in any meaningful sense. Perhaps most importantly, the SEC cannot dictate which accounting firms the Board should investigate or how it should perform its investigations. Instead, the SEC possesses only the authority to review the Board's sanctions once they are imposed. See 15 U.S.C. 7217(c)(2)-(3). As to the investigations themselves, the SEC has only the limited authority to relieve the Board of its "responsibility to enforce compliance," 15 U.S.C. 7217(d)(1), and to censure the Board for failing to engage in enforcement or for violating the Sarbanes-Oxley Act or the securities laws, see 15 U.S.C. 7217(d)(2). Although the SEC has somewhat broader authority with regard to the Board's rulemaking functions, even that authority is not untrammeled: while the Board's rules require SEC approval, see 15 U.S.C. 7217(b)(2), the SEC may reject the

Board's rules only if it finds that they are inconsistent with the Sarbanes-Oxley Act or the securities laws or that they are not "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. 7217(b)(3). In short, it is impossible to conclude that the Board's work is directed or supervised by SEC commissioners when "the Board has plenary statutory authority to conduct its most critical functions * * * without *any* opportunity for the SEC to prevent and affirmatively command, and to manage the ongoing conduct of, those activities." Pet. App. 96a (Kavanaugh, J., dissenting).

The lack of day-to-day oversight of the Accounting Board's activities is compounded by the fact that SEC commissioners have only narrow authority to remove the Board's members—and therefore lack the ultimate authority to demand adherence to the SEC's direction. See *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986) (noting that, "[o]nce an officer is appointed, it is only the authority that can remove him * * * that he must fear and, in the performance of his functions, obey"). The SEC may remove a Board member only if it determines, after notice and a hearing, that the member "has willfully violated any provision" of the Board's rules, the Sarbanes-Oxley Act, or the securities laws; "has willfully abused [his] authority"; or, "without reasonable justification or excuse, has failed to enforce compliance" with the Board's rules, the Sarbanes-Oxley Act, or the securities laws. 15 U.S.C. 7217(d)(3). Those stringent limitations on the SEC's removal power, moreover, are entirely consonant with the broader purpose of the Sarbanes-Oxley Act: namely, to create an independent regulator for the accounting industry that would not be subject to the command of the SEC (or any other component of the Executive Branch). See, *e.g.*, 148 Cong. Rec. 12,119

(2002) (statement of Sen. Gramm) (explaining that the Board was vested with "massive power, unchecked power, by design"). The limitations on the ability to remove Board members not only present an independent constitutional problem; they also illustrate why the Board, as currently constituted, is inconsistent with the Appointments Clause.

II. THE NAFTA BINATIONAL PANEL REVIEW SYSTEM PRESENTS SIMILAR SEPARATION-OF-POWERS CONCERNS, INCLUDING SIMILAR CONCERNS UNDER THE APPOINTMENTS CLAUSE

The principal purpose of this brief is to bring to the Court's attention similar constitutional concerns raised in another context: *viz.*, by the binational panel review system instituted by the North American Free Trade Agreement. As one commentator has put it, "[n]o other law gives such sweeping powers to private citizens to perform what is, in effect, a kind of judicial or administrative review of the decisions of federal officers." Alan B. Morrison, *Appointments Clause Problems in the Dispute Resolution Provisions of the United States-Canada Free Trade Agreement*, 49 Wash. & Lee L. Rev. 1299, 1299-1300 (1992) (A. Morrison). In particular, to the extent that NAFTA binational panels are viewed as performing an executive rather than judicial function, those panels, like the Accounting Board, are inconsistent with the Appointments Clause, because panel members are "Officers of the United States" who must be appointed in the prescribed manner. The Court's decision in this case therefore may have implications for future challenges to the binational panel review system; indeed, in deciding this case, the Court may wish to indicate that the panel system raises serious constitutional concerns.

A. NAFTA Gives Binational Panels The Authority To Decide Questions Of American Law Without Judicial Review

1. For more than a century, Congress has provided for the imposition of duties when a domestic industry is harmed by unfairly traded foreign goods. There are two primary types of those duties: antidumping duties, which are imposed when foreign goods are being sold, or are likely to be sold, in the United States at less than their fair value, see 19 U.S.C. 1673(1), and countervailing duties, which are imposed when a foreign government provides a countervailable subsidy with regard to the imported goods in question, see 19 U.S.C. 1671(a). Both types of duties are imposed in essentially the same fashion; with regard to antidumping duties, the process operates as follows. An "interested party" (including a member of a domestic industry) may petition the Department of Commerce for the imposition of a duty. See 19 U.S.C. 1673a(b)(1). If the Commerce Department determines that the foreign goods were sold in the United States at less than their fair value, it notifies the International Trade Commission (ITC), which then determines whether the domestic industry was materially injured, threatened with injury, or materially retarded by virtue of the dumping. See 19 U.S.C. 1673(2), 1673a(c)-(d). If the ITC so determines, the Commerce Department issues an order directing U.S. Customs and Border Protection to assess a duty on the goods in an amount equal to the amount by which the goods were being undersold. See 19 U.S.C. 1673d(c)(2), 1673e(a).

An interested party may seek review of a determination by the Commerce Department or the ITC before the Court of International Trade (CIT), an Article III tribunal. See 19 U.S.C. 1516a(a)(1)-(2). A decision of the Court of International Trade, in turn, is reviewable by

the Court of Appeals for the Federal Circuit, see 28 U.S.C. 1295(a)(5), and ultimately by this Court, see 28 U.S.C. 1254(1).

2. With regard to the importation of goods from Canada and Mexico, however, the foregoing judicial review process has been displaced as a result of the North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605 (NAFTA). Pursuant to the terms of NAFTA (and a predecessor free-trade agreement between the United States and Canada), Congress implemented an alternative review system for decisions concerning the imposition of duties on goods imported from Canada and Mexico. Under that system, an interested party may seek review from a binational panel, rather than the CIT. See 19 U.S.C. 1516a(g)(8)(A)(i); NAFTA Art. 1904(2), 32 I.L.M. 683. A binational panel consists of five members; each government selects two members, normally from a preestablished roster of candidates, and the fifth member is selected either by agreement of the governments or (as is the usual practice) by one of the governments chosen by lot. See NAFTA Annex 1901.2, 32 I.L.M. 687. The United States' panel members are selected by the U.S. Trade Representative, subject to peremptory challenges exercised by the foreign government. See 19 U.S.C. 3432(a)(2); NAFTA Annex 1901. 2(2), 32 I.L.M. 687. Notably, when a binational panel reviews the determinations of the Commerce Department or the ITC, it applies American law, see NAFTA Art. 1904(2), 32 I.L.M. 683, and its decision is binding, see NAFTA Art. 1904(9), (15), 32 I.L.M. 683, 684.

The decision of a binational panel is ordinarily unreviewable by an Article III court. See 19 U.S.C. 1516a(g)(2). Indeed, NAFTA itself specifically prohibits the signatory countries from providing for judicial review in their domestic law. See NAFTA Art. 1904(11), 32

I.L.M. 683. Instead, either of the involved governments, but not a private party, may seek review from a binational "extraordinary challenge committee." NAFTA Annex 1904.13(1), 32 I.L.M. 688. That committee consists of three members; each government selects one member from a list of current or former judges, and the third member is selected by lot. *Ibid.* The extraordinary challenge committee may vacate a binational panel's decision only if (1) a member of the panel was guilty of gross misconduct or bias, the panel seriously departed from a fundamental rule of procedure, or the panel manifestly exceeded its authority, and (2) the error materially affected the panel's decision and threatens the integrity of the review process. See NAFTA Art. 1904(13), 32 I.L.M. 683. The decision of an extraordinary challenge committee, like the decision of a binational panel, is binding and unreviewable by an Article III court. See 19 U.S.C. 1516a(g)(7)(A).

In implementing the provisions of NAFTA establishing the binational panel review system, Congress anticipated the possibility of constitutional challenges to the system. Congress thus provided that a constitutional challenge could be brought directly in the United States Court of Appeals for the District of Columbia Circuit within thirty days of notice that the binational panel had completed review of an underlying determination. See 19 U.S.C. 1516a(g)(4)(A), (C). In considering such a challenge, however, the D.C. Circuit is not permitted to consider the record of proceedings before the panel. See 19 U.S.C. 1516a(g)(4)(G). Congress additionally provided for expedited review by this Court, under its appellate jurisdiction, of any final judgment by the D.C. Circuit. See 19 U.S.C. 1516a(g)(4)(H).

3. Since the implementation of NAFTA in 1994, various parties, including the Coalition, have sought to

challenge the constitutionality of the binational panel review system, particularly in connection with the long-standing dispute between the United States and Canada concerning Canadian subsidies to its lumber industry. None of those challenges, however, has resulted in a judgment on the merits.

Most recently, in 2002, the Commerce Department determined both that Canadian softwood lumber products were being sold in the United States at less than their fair value and that the Canadian government was providing countervailable subsidies in connection with Canadian softwood lumber imports; the ITC further determined that the domestic industry was threatened with material injury by virtue of the imports. After the Commerce Department imposed duties, the Canadian government invoked the binational panel review process. A binational panel repeatedly remanded the matter to the ITC, ultimately instructing the ITC to determine that the evidence on the record did not support a finding of threat of material injury. After the ITC made such a determination under protest, the binational panel affirmed. The United States requested review of the binational panel's decision from an extraordinary challenge committee, but the committee affirmed. See *Coalition for Fair Lumber Imports* v. *United States*, 471 F.3d 1329, 1331-1332 (D.C. Cir. 2006) (*Coalition*).

The Coalition subsequently brought a constitutional challenge in the D.C. Circuit, claiming, *inter alia*, that NAFTA's binational panel review system violated either Article III of the Constitution or the Appointments Clause. After briefing and oral argument, the United States and Canada entered into a settlement, pursuant to which the United States agreed not to pursue any duties against the Canadian lumber industry in return for certain concessions. See *Coalition*, 471 F.3d at 1332.

The D.C. Circuit subsequently dismissed the action, on the ground that the settlement deprived it of jurisdiction to consider the Coalition's constitutional challenge. *Id.* at 1332-1333. By its terms, the settlement will remain in effect until 2013.

B. By Assigning A Judicial Function To A Non-Article III Tribunal, The NAFTA Binational Panel Review System Violates Article III Of The Constitution

The better understanding of the NAFTA binational panel review system is that binational panels perform a judicial function. That is because binational panels perform exactly the same function that the Court of International Trade performed before the implementation of NAFTA, and that the CIT continues to perform with regard to challenges to duty determinations involving imports from every other nation (and, where no party invokes the panel system, from Canada and Mexico as well). See 19 U.S.C. 1516a(a)(1)-(2). NAFTA itself recognizes that binational panels perform a judicial function, by providing that "each [signatory nation] shall *replace* judicial review of final antidumping and countervailing duty determinations with binational panel review." NAFTA Art. 1904(1), 32 I.L.M. 683. By its terms, therefore, NAFTA allocates a concededly judicial function to a non-Article III (and, indeed, non-domestic) tribunal. That unprecedented outsourcing of judicial authority cannot be reconciled with Article III of the Constitution.

1. As a preliminary matter, the NAFTA binational panel review system is constitutionally problematic not only because it assigns a judicial function to a non-Article III tribunal, but also because it prohibits Article III courts from reviewing the actions of that tribunal (except to consider constitutional challenges to the system). See 19 U.S.C. 1516a(g)(2)(B) (providing that "no court of the

United States has power or jurisdiction to review the determination [of a binational panel] on any question of law or fact").

None of the leading cases in which this Court has considered challenges to non-Article III tribunals involved such a complete preclusion of Article III review. In *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833 (1986), the Court upheld the delegation of authority to the Commodity Futures Trading Commission (CFTC) to adjudicate common-law counterclaims where the counterclaim plaintiff had waived its right to bring that claim before an Article III court; in so holding, however, the Court noted that the CFTC's decision remained subject to judicial review (including de novo review on questions of law). See *id.* at 849, 853. Similarly, in *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), the Court upheld a binding arbitration mechanism in the Federal Insecticide, Fungicide, and Rodenticide Act, in part on the ground that it "limits but does not preclude review of the arbitration proceeding by an Article III court." *Id.* at 592. Finally, even in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), in which the Court effectively invalidated portions of the Bankruptcy Reform Act, there was Article III appellate review as of right from a non-Article III bankruptcy court. See *id.* at 55, 85-86 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in the judgment).

Here, by contrast, the NAFTA binational panel review system divests parties of *any* right to be heard in an Article III court, except on a constitutional challenge to the system—even where the determination of the binational panel was infected by fraud or misconduct. See NAFTA Art. 1904(13), 32 I.L.M. 683 (providing for review by an extraordinary challenge committee, but not

by a domestic court, in those circumstances). Because the panel system provides no Article III protection for the "personal * * * interests" of litigants challenging duty determinations, it raises serious Article III concerns on that basis alone. *Schor*, 478 U.S. at 848; see *Northern Pipeline*, 458 U.S. at 70 n.23 (plurality opinion).

2. In any event, the NAFTA binational panel review system fails the balancing test that this Court set out in *Schor* for reviewing an Article III challenge to a non-Article III tribunal. In *Schor*, the Court noted that it had "declined to adopt formalistic and unbending rules," but had instead "weighed a number of factors," in assessing whether a congressional action would have an impermissible effect on the constitutionally assigned role of the federal judiciary. 478 U.S. at 851. Specifically, the Court stated that it had focused on "the extent to which the essential attributes of judicial power are reserved to Article III courts," and, conversely, "the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III." *Ibid.* (internal quotation marks and citations omitted). An analysis of those factors reveals the infirmities of the panel system.

a. Most importantly, the NAFTA binational panel review system reserves *none* of the essential attributes of judicial power to Article III courts. As discussed above (see p. 10), the panel system divests the Court of International Trade of any authority once a party seeks review from a binational panel, see 19 U.S.C. 1516a(g)(2)(A), and also divests the CIT and other Article III courts of any authority to review the binational panel's decision

(except for constitutional challenges), see 19 U.S.C. 1516a(g)(2)(B), (g)(4)(A). The panel system therefore does not merely involve a "single deviation" from the traditional model of judicial review following agency action, *Schor*, 478 U.S. at 852; it abrogates that model altogether. The absence of any Article III review counsels heavily—and indeed decisively, see pp. 13-15, *supra*—against the panel system's constitutionality.

b. Conversely, NAFTA binational panels exercise *all* of the essential jurisdiction and powers normally vested in Article III courts. Put simply, binational panel members "act just like the Article III judges whom they replace." A. Morrison, *supra*, at 1301. Like the CIT in cases involving imports from other nations, a binational panel has essentially plenary authority to decide whether determinations by the Commerce Department and the ITC are "in accordance with the antidumping and countervailing duty law of [the United States]": specifically, "the relevant statutes, legislative history, regulations, administrative practice and judicial precedents [on which] a court of [the United States] would rely" in reviewing duty determinations. NAFTA Art. 1904(2), 32 I.L.M. 683. NAFTA even lists specific statutes that binational panels must apply in cases involving duties imposed by the United States. See NAFTA Annex 1911, 32 I.L.M. 691, 692. Needless to say, the decisions of binational panels are binding on the parties involved. See NAFTA Art. 1904(9), 32 I.L.M. 683.

NAFTA thus effectively creates a two-track judicial system, under which certain challenges to duty determinations are reviewed by binational panels and other challenges are reviewed by the CIT. Under that two-track system, binational panels resolve matters of domestic law in effectively the same manner as Article III courts, but without the protections that Article III affords.

c. The origins and importance of the right adjudicated also counsel against sustaining the panel system's constitutionality. In considering that factor in *Schor*, this Court distinguished between so-called "public rights" (*i.e.*, matters that could be "conclusively determined by the Executive and Legislative branches") and "private rights" (*i.e.*, matters that were "historically the types of matters subject to resolution by Article III courts"). See 478 U.S. at 853-854 (citation omitted). At the same time, the Court made clear that "the distinction between public rights and private rights" is not "determinative for Article III purposes." *Id.* at 853.

The most that can be said about duty determinations is that they involve a hybrid form of right with a public component. On the one hand, the federal government levies duties itself, and, for that reason, this Court has suggested that the imposition of duties does not "inherently or necessarily require[] judicial determination." *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929). On the other hand, a member of a domestic industry that has been injured by unfair trade practices may petition the government for the imposition of a duty, see 19 U.S.C. 1673a(b)(1); that duty is levied on the imported goods (and is therefore effectively imposed on the producers of the goods, rather than the foreign government itself), see 19 U.S.C. 1673d(c)(1), 1673e(a)-(b); and the domestic industry directly benefits from the imposition of that duty. A proceeding concerning the imposition of a duty is therefore comparable in many respects to an ordinary commercial dispute between private parties—and, accordingly, Congress has committed the review of such proceedings to Article III courts for more than fifty years. See Act of July 14, 1956, Pub. L. No. 84-703, § 1, 70 Stat. 532 (conferring Article III status on the Customs Court, the predecessor to the CIT). The nature of

the right to be adjudicated therefore does not weigh heavily in the analysis; if anything, it too points toward a determination of unconstitutionality.

d. Finally, the concerns that drove Congress to depart from the requirements of Article III in this context are insubstantial, and there are therefore no "valid and specific legislative necessities" to support the panel system's constitutionality. *Schor*, 478 U.S. at 855. In prior decisions, this Court has justified departures from the requirements of Article III on the ground that non-Article III tribunals have enhanced the efficiency of Article III courts, see *Peretz* v. *United States*, 501 U.S. 923, 934-935 (1991); reduced the backlog in those courts, see *Palmore* v. *United States*, 411 U.S. 389, 408-409 (1973); or possessed expertise in specialized areas of the law, see *Schor*, 478 U.S. at 855-856.

None of those justifications is applicable here. Congress had already committed review of duty determinations to an Article III court with expertise in the area—the CIT. In fact, the CIT was originally established for the specific purpose of creating a specialized court that could bring efficiency and uniformity to the review of duty determinations. See, *e.g.*, H.R. Rep. No. 1235, 96th Cong., 2d Sess., Pt. 1, at 20 (1980). The panel system does little to increase the efficiency of the CIT, because it exerts jurisdiction over claims arising from only two nations, and it potentially gives rise to disuniformity in the law, because it creates a two-track system of review.

In NAFTA, Congress agreed to surrender Article III review of duty determinations involving Canada and Mexico—and to consign that review to a non-domestic tribunal—as a condition of securing the perceived benefits of the agreement. See A. Morrison, *supra*, at 1307 (concluding that "there is little doubt that the driving force behind the change [in the law] was the Canadian

dissatisfaction with the outcome of proceedings in the United States, even after judicial review was completed"). Under the balancing framework of *Schor*, the resulting system violates Article III.

3. One additional factor demonstrates that the NAFTA binational panel review system raises particularly acute Article III concerns. A binational panel may take jurisdiction over a decision concerning the imposition of a duty at the request of any interested party, even over the objection of another party. See 19 U.S.C. 1516a(g)(8)(A)(i); NAFTA Art. 1904(2), 32 I.L.M. 683. This Court has repeatedly focused on the presence (or absence) of the consent of the parties in evaluating the constitutionality of non-Article III tribunals. See, *e.g.*, *Schor*, 478 U.S. at 848-849; *Thomas*, 473 U.S. at 591; *Northern Pipeline*, 458 U.S. at 79 n.31. Most recently, in *Schor*, the Court noted that it had previously considered "the absence of consent to an initial adjudication before a non-Article III tribunal" to be "a significant factor in determining that Article III forbade such an adjudication," 478 U.S. at 849, and it relied heavily on the presence of such consent as a basis for sustaining the challenged delegation of authority to the CFTC, see *id.* at 849-851.

A fortiori, where, as here, a claim can be assigned to a non-Article III tribunal even absent consent—and where that tribunal conducts not merely the "initial adjudication," but effectively the *entire* adjudication—there is strong reason to question the constitutionality of the system. By assigning a judicial function to a non-Article III tribunal, and doing so without the consent of all of the interested parties, the NAFTA binational panel review system violates Article III.

C. To The Extent That Binational Panels Do Not Perform A Judicial Function, The NAFTA Binational Panel Review System Violates The Appointments Clause

As discussed above (see p. 13), the better understanding of the NAFTA binational panel review system is that binational panels perform a judicial function, because binational panels perform exactly the same function that the CIT performed before the implementation of NAFTA (and continues to perform with regard to other nations). Alternatively, however, binational panels could be conceived as performing an executive function, because binational panels review the decisions of the Commerce Department and the ITC and thus effectively serve in a supervisory capacity vis-à-vis those components of the Executive Branch. To the extent that the latter understanding is the better one, the panel system raises Appointments Clause concerns comparable to, if not greater than, those raised by the Accounting Board. In fact, the panel system fails the Appointments Clause at an earlier step of the analysis, because panel members qualify as "Officers of the United States." The panel system fails to comply even with the minimal constitutional requirements for the appointment of inferior officers, because a foreign government selects some members—and, in some cases, a majority of the members—of the panels (and has the power to veto the others). Regardless of how the function performed by binational panels is characterized, therefore, the panel system is unconstitutional.

1. This Court's leading decision on the meaning of the phrase "Officers of the United States" is *Buckley* v. *Valeo*, 424 U.S. 1 (1976). In earlier cases, the Court had suggested that, for purposes of determining whether an individual was an officer of the United States for pur-

poses of the Appointments Clause, the inquiry turned on the "tenure, duration, emolument, and duties" of the individual's position. *United States* v. *Germaine*, 99 U.S. 508, 512 (1879). In *Buckley*, however, the Court refocused the inquiry away from the formalities of an individual's position toward the functions that the individual actually performs. Specifically, the Court explained that the "fair import" of the phrase "Officers of the United States" was that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause]." *Buckley*, 424 U.S. at 126.

2. Under the standard set out in *Buckley*, members of binational panels readily qualify as "Officers of the United States."

a. As explained above (see p. 10), the primary function of a binational panel is to review the determinations of the Department of Commerce (in the context of antidumping duties, as to whether foreign goods were sold in the United States at less than their fair value) and the ITC (as to whether the affected domestic industry was materially injured by virtue of the dumping). See 19 U.S.C. 1516a (g)(8)(A)(i); NAFTA Art. 1904(2), 32 I.L.M. 683. A binational panel applies (and, where necessary, interprets) American law in reviewing those determinations—and its decisions are binding and ordinarily unreviewable by any Article III judge or properly appointed officer of the United States. See 19 U.S.C. 1516a(g)(2); NAFTA Art. 1904(2), (9), (15), 32 I.L.M. 683, 684. Given the nature of those duties, there can be no serious dispute that the authority exercised by binational panel members constitutes "significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126.

Perhaps the best evidence that binational panel members exercise "significant authority pursuant to the laws of the United States" is that they exercise essentially the same authority exercised by judges of the CIT with regard to other nations. As discussed above (see p. 13), because judges of the CIT are Article III judges, the better understanding is that binational panels also perform a judicial function, in violation of Article III. To the extent that binational panels are understood to perform an executive function, however, judges of the CIT, like other Article III judges, could be said to exercise "significant authority pursuant to the laws of the United States"; indeed, as a matter of constitutional structure, Article III judges are most closely analogous to *principal* officers in the Executive Branch, who, like Article III judges, are nominated by the President and confirmed by the Senate. It necessarily follows that binational panel members exercise "significant authority pursuant to the laws of the United States" as well.

A contrary view, under which binational panel members would not qualify as officers of the United States, would lead to nonsensical results. To the extent that a binational panel is understood to perform an executive function, a binational panel effectively operates in a supervisory capacity over the Department of Commerce and the ITC, whose determinations it is reviewing. For purposes of the Appointments Clause, however, both the Secretary of Commerce (as a "Head of Department") and the members of the ITC are superior officers who must be nominated by the President and confirmed by the Senate. Cf. 19 U.S.C. 1330(a) (establishing the appointment procedure for ITC members). It would be passing strange if the members of an entity with the power to review determinations that are themselves made by principal officers—and to issue binding orders

directing those officers to take action, see 19 U.S.C. 1516a(g)(7)(A)—would not even qualify as inferior officers for Appointments Clause purposes. Indeed, at least one commentator has suggested that it would be "unthinkable" if binational panel members were not *principal* officers for that reason, much less officers of the United States in the first place. See A. Morrison, *supra*, at 1302; cf. Jim Chen, *Appointments With Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 Wash. & Lee L. Rev. 1455, 1487 (1992) (Chen) (stating that "one hesitates to assert that an officer who can review agency decisions is 'inferior' ").

b. This case itself provides further confirmation that binational panel members are officers of the United States, because the authority exercised by binational panel members is comparable to that exercised by the Accounting Board. Notably, respondents in this case have effectively conceded that Accounting Board members are "officers of the United States, rather than mere employees who are lesser functionaries." Pet. App. 81a (Kavanaugh, J., dissenting) (internal quotation marks and citation omitted). Like members of the Accounting Board, binational panel members have broad authority within a specialized area—whether the regulation of the accounting industry, in the case of the Accounting Board, or the review of duty determinations, in the case of binational panels. Just as the Accounting Board has the authority to promulgate rules (and to impose sanctions for violations of those rules), see 15 U.S.C. 7213(a)(1), 7215(c)(4), binational panels have the authority to apply and interpret domestic law (and to uphold or overturn determinations concerning the imposition of duties), see NAFTA Art. 1904(2), (9), (15), 32 I.L.M. 683, 684. And much like the Accounting Board, which is subject only to

limited oversight by the SEC, see pp. 6-7, *supra*, binational panels are subject only to limited oversight by extraordinary challenge committees, and essentially no oversight by Article III judges or properly appointed executive officials. See, *e.g.*, 19 U.S.C. 1516a(g)(2)(B). Regardless whether the Court decides in this case that Accounting Board members are principal or inferior officers, therefore, it is hard to fathom how binational panel members would not qualify as officers of the United States at all.

The authority exercised by binational panel members is also comparable to that exercised by other individuals whom this Court has previously held to be officers of the United States for purposes of the Appointments Clause. Most notably, binational panel members "exercise at least as much authority as special trial judges in the Tax Court," Chen, *supra*, at 1481, whom this Court held to be officers in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991). In so holding, the Court reasoned that special tax judges "perform more than ministerial tasks," because they "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Id.* at 881-882. Indeed, the Court noted, special tax judges also have the authority to render decisions on behalf of the Tax Court in certain cases by assignment of that court's chief judge. *Id.* at 882. *A fortiori*, binational panel members—who have the authority to render binding decisions in a *whole category* of cases—exercise "substantial authority pursuant to the laws of the United States," and thus qualify as officers of the United States, under the standard articulated in *Buckley*.

c. Even under the standard articulated in this Court's earlier Appointments Clause cases, which placed more weight on the formalities of an individual's position

in determining officer status, binational panel members would qualify as officers. To be sure, panel members serve for relatively limited tenures. Under NAFTA, panel members are normally chosen from a preestablished roster of candidates, see NAFTA Annex 1901.2(1)-(3), 32 I.L.M. 687; the U.S. Trade Representative prepares the United States' roster, which is updated annually, and selects the United States' panel members. See 19 U.S.C. 3432. An individual listed on the United States' roster may therefore end up serving only on a single panel—and, in fact, may never serve at all. Once an individual is named as a panel member, however, he serves until the dispute in question is resolved. And it is worth noting that, in complex cases, the resolution of a dispute can take a substantial period of time: in the dispute that gave rise to the Coalition's most recent challenge in the D.C. Circuit, it took *more than two years* before the binational panel finally overturned the ITC's initial determination on material injury. See *Coalition*, 471 F.3d at 1331-1332.

In any event, it does not follow from the fact that an individual may end up serving only on a single panel that a panel member does not qualify as an officer under the Appointments Clause. For the duration of panel service, a panel member exercises substantial authority under American law. In that respect, a panel member is no different from an independent counsel, who would typically serve for only a single investigation (and yet unquestionably qualified as an officer for Appointments Clause purposes). See *Morrison*, 487 U.S. at 671 n.12. And the fact that an individual could be placed on the roster of candidates and yet never serve as a panel member is irrelevant, because the relevant question here is whether a *panel member*, not a mere candidate for panel membership, qualifies as an "officer." Neither the relatively lim-

ited tenure of a panel member, nor any other formality attending a panel member's status, detracts from the conclusion that panel members exercise substantial authority and thus qualify as officers under the Appointments Clause.

d. Even assuming that panel members are merely inferior officers for purposes of the Appointments Clause, it is clear that the binational panel review system does not comply with the Appointments Clause's requirements. Two, and possibly three, members of each binational panel are appointed not by the President, a Court of Law, or a Head of Department, but rather by a foreign government. There is no conceivable way to reconcile that practice with the requirements of the Appointments Clause. And even as to the members of the panel who are selected by the United States, those members are chosen by the U.S. Trade Representative, see 19 U.S.C. 3432(a)(2)—and it is an open question whether the U.S. Trade Representative qualifies as a "Head of Department" with the power to appoint inferior officers. Cf. Pet. Br. 57-59 (discussing whether the SEC is a "Department"). The foreign government, moreover, may effectively veto those selections by exercising peremptory challenges. See NAFTA Annex 1901.2(2), 32 I.L.M. 687. To the extent that binational panels are understood to perform an executive function, therefore, the binational panel review system violates the Appointments Clause.

D. The History Of International Arbitral Panels Does Not Render The NAFTA Binational Panel Review System Constitutional

In defending the constitutionality of the NAFTA binational panel review system in prior litigation, the government primarily contended that the panel system was rendered constitutional by the United States' historical

practice of submitting disputes to international arbitral panels with foreign members. See, *e.g.*, U.S. Br. at 19-30, *Coalition*, *supra* (No. 05-1366). That contention lacks merit, because NAFTA binational panels differ from prior international arbitral panels in two crucial respects: first, they are required to apply American law, and second, they consider preexisting claims under domestic law against private parties.

1. Most notably, there is simply no precedent for delegating the application of American law to an international tribunal. Without exception, all of the historical international tribunals were directed or permitted to adjudicate claims with reference to other sources of law—as the ITC seemingly recognized in a memorandum submitted to Congress during hearings on the predecessor agreement to NAFTA. See *United States-Canada Free Trade Agreement: Hearings Before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 334 (1988) (memorandum from Kristian Anderson, Staff Attorney, Office of the General Counsel, to the ITC). To the extent that members of international tribunals were not required to apply American law, they could not be said either to trench impermissibly upon the jurisdiction of Article III courts or to exercise substantial authority pursuant to the laws of the United States for purposes of the Appointments Clause.

The first international arbitral tribunal in which the United States participated was a commission established to decide, *inter alia*, claims by American citizens against the British government for losses sustained in connection with the taking of property by British forces during the Revolutionary War. See Treaty of Amity, Commerce, and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, Arts. 7-8, 8 Stat. 121-122 (Jay Treaty). At the time of the

treaty, foreign governments were understood to be immune from suit in American courts as a matter of grace. See, *e.g.*, *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (discussing history of foreign sovereign immunity). Unsurprisingly, therefore, the treaty did not require the commission it established to decide claims by American citizens according to American law, but instead directed it to resolve those claims under generally applicable legal principles: *i.e.*, "according to the merits * * * and to justice, equity, and the laws of nations." Jay Treaty Art. 7, 8 Stat. 121. Other treaties operated similarly: for example, Pinckney's Treaty, which created a commission to decide claims by American citizens regarding property taken at sea by Spanish forces during Spain's then-recent war with France, likewise directed the commission to resolve those claims "according to the merits * * * and to justice, equity, and the laws of nations," rather than pursuant to American law. Treaty of Friendship, Limits, and Navigation, U.S.-Spain, Oct. 27, 1795, Art. 21, 8 Stat. 150.

The Iran-United States Claims Tribunal, considered by this Court in *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), is not to the contrary. The underlying agreement establishing the tribunal did not require the tribunal to apply American law to the claims of American citizens against the Iranian government; instead, it directed the tribunal to resolve those claims "on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the [t]ribunal determines to be applicable." Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, Art. 5, 20 I.L.M. 232. Accordingly, while the undoubted effect of

the agreement, as implemented by the President, was to foreclose American citizens from pursuing some claims in Article III courts, this Court held that the remission of those claims to the tribunal did not violate Article III. *Dames & Moore*, 453 U.S. at 684-686. The Court reasoned that, in remitting the claims, the President had merely "exercised [his] power * * * to settle claims" and, as such, had "simply effected a change in the substantive law governing the lawsuit." *Id.* at 685. The NAFTA binational panel review system inflicts a far weightier constitutional harm, because it not only remits preexisting claims under American law to a non-Article III tribunal, but also requires that tribunal to resolve the claims by applying and interpreting American law. There is no precedent in the history of international arbitral tribunals for outsourcing the application of American law in that manner.

2. In addition, there is no precedent for the reassignment of claims to an international arbitral tribunal where the dispute involves preexisting claims under domestic law against private parties (and that, in many cases, have been initiated by other private parties). The cited examples of international arbitral tribunals all involved claims by American citizens against foreign governments. As noted above (see pp. 27-28), those claims were traditionally not cognizable in American courts, and it has long been established that those claims, like claims belonging to the United States itself, could appropriately be resolved by international agreement—and, where the parties to the agreement so agreed, by an international arbitral tribunal. See, *e.g.*, *Dames & Moore*, 453 U.S. at 679. The international agreement, in turn, would often create or define the right to recover, as well as providing the forum in which to do so—and, for that reason, the

United States often entered into such agreements with the full consent of the claimants. See *ibid.*

Here, by contrast, the NAFTA binational panel review system remits to an international tribunal the resolution of preexisting claims under domestic law against *private parties*, not just foreign governments—and it does so even where the American party that initiated the claim does not consent to the tribunal's jurisdiction. Rather than extinguishing or modifying those claims as a substantive matter, moreover, NAFTA directs the international tribunal to adjudicate those claims under American law. In the case of antidumping duties, although a foreign government may participate in those proceedings (and may even invoke the jurisdiction of the international tribunal), it is not truly a party, even if it has an interest in the outcome, because any duty that is at issue in those proceedings does not run against the foreign government. The NAFTA binational panel system is therefore a different animal from any prior international dispute resolution system in which the United States has participated, and it accordingly presents unprecedented constitutional difficulties.

* * * * *

It is comparatively rare that Congress acts in such a way as to raise Appointments Clause concerns. When it does, however, this Court should afford the action careful scrutiny. For the reasons stated herein and at greater length by petitioners, Congress violated the Appointments Clause by vesting the authority to appoint Accounting Board members in the SEC. So too, to the extent that NAFTA binational panels are viewed as performing an executive function, Congress violated the Appointments Clause by conferring substantial authority on those panels without complying with the constitution-

ally prescribed requirements. And to the extent binational panels are better viewed as performing a judicial function, the panel system cannot be reconciled with the requirements of Article III. The Court should invalidate the Accounting Board, as presently constituted, and, in so doing, make clear that the NAFTA panel system raises similar, and serious, constitutional concerns.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 08-861

IN THE

Supreme Court of the United States

FREE ENTERPRISE FUND AND BECKSTEAD and WATTS, LLP,

Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD and UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR CONSTITUTIONAL AND ADMINISTRATIVE LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amici curiae Harold Bruff, Richard Fallon, Jerry Mashaw, Gillian Metzger, Henry Monaghan, Richard Revesz, Richard Stewart, and David Strauss (see Appendix) are professors of constitutional law and administrative law with expertise in the area of separation of powers. Amici teach, research, and write on many of the issues presented in this case, including the scope of presidential appointment and removal powers, the structure of federal administrative government, and the scope of private regulatory schemes. Amici submit this brief to demonstrate that petitioners' broad view of presidential authority is not constitutionally mandated and risks upending longstanding precedent and established governmental practice.[1]

SUMMARY OF ARGUMENT

In this case, petitioners take aim at the removal and appointment provisions governing the Public Company Accounting Oversight Board ("Board"), created by the Sarbanes-Oxley Act of 2002 ("Act"), 15 U.S.C. §§ 7201 *et seq.* The precise scope of petitioners' constitutional challenge, however, is far from clear. At times, petitioners appear sympathetic to the view, raised expressly by their amici, that under the Constitution, "Presidents have the power to remove at will all persons exercising executive

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

authority on their behalf." Con. Law Acad. Br. at 2; *see also* Pet. Br. at 19-24 (arguing that removal restrictions undermine political accountability and enhance congressional power. At other points, however, petitioners appear to retreat to the position—espoused by the dissent below, *see* Pet. App. at 68a, 74a—that only the specific removal provisions challenged here are constitutionally flawed. These provisions, petitioners assert, must be set aside because they do not give the President or a presidential appointee who is herself removable at will (what they call a "presidential alter-ego") direct or immediate ability to remove executive officers such as the Board members. *See* Pet. Br. at 25.

Either version of petitioners' challenge, if accepted, would have far-reaching disruptive effects. A decision by this Court imposing a requirement of presidential at-will removal power over all executive officials would require overruling longstanding and deeply entrenched precedents, just as petitioners' amici expressly urge. *See* Con. Law Acad Br. at 1; Mountain States Leg. Found. Br. at 25-37. Similar disruption would result if this Court were to draw a categorical line mandating that the President or a presidential alter ego must have some direct ability to remove any executive official. These claims for unlimited presidential removal authority would cast into constitutional doubt broad swaths of our current governmental structure, including not just independent agencies, but in addition the civil service system and any other number of assorted removal protections embedded in different statutory schemes. Petitioners' challenges also threaten schemes of public-private cooperation that are basic to our system of financial regulation.

Petitioners and their amici offer no support for undertaking such a dramatic departure from established precedent and practice. Constitutional text and structure do not require either unfettered presidential at-will removal power or some immediate presidential role in all removals. Although the broad presidential authority petitioners seek might have represented a conceivable account of the scope of the removal power, it simply is not the constitutional understanding that has emerged over time. Instead, this Court has long settled on an understanding that accepts statutory limits on removal, provided Congress does not seek to insert itself directly into the removal process and does not undercut the President's ability to perform his constitutional duty to "take Care that the Laws be faithfully executed."

The appropriate analytical framework for resolving the question presented in this case is clearly outlined in this Court's established precedent, as Petitioners acknowledge. *See* Pet. Br. at 18. This Court must decide whether the challenged removal restrictions materially impede the President's ability to perform his constitutional duty. Under that standard, the Board's removal protections are plainly constitutional, given the extensive authority that the Securities and Exchange Commission (SEC)—whose members are themselves removable by the President for cause[2]—wields over the

2. Although no statutory provision expressly grants SEC Commissioners for-cause removal protection, that protection is commonly assumed to exist. *See MFS Sec. Corp. v. SEC*, 380 F.3d 611 (2d Cir. 2004). SEC Commissioners have the fixed, staggered terms and political balance requirements that are typical of many independent agencies. 15 U.S.C. § 78d(a).

Board. Such broad SEC oversight also confirms that Board members are inferior officers, and thus petitioners' Appointment Clause argument fails. Petitioners' suggestion that SEC Commissioners cannot exercise inferior officer appointment authority as heads of a department is equally without merit and is nothing more than an effort to bring in through the backdoor constitutional limits that this Court has already rejected.

ARGUMENT

I. Unlimited Presidential Removal Authority Is Not Required by the Constitution and Is at Odds with Deeply Entrenched Precedent and Practice

A. Neither Constitutional Text Nor Constitutional Structure Compels Unlimited Presidential Removal Power

The Constitution creates a unitary structure for the executive branch. That much is plain from Article II's text, which provides that "[t]he executive Power shall be vested in a President." U.S. Const., art. II, § 1, cl. 1. It is confirmed by the repeated rejection of proposals for a plural executive at the constitutional convention. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 599-602 (1984).

The real issue, however, concerns what this unitary executive structure entails for the scope of presidential

authority over administration of the laws.[3] Here the

3. Although this brief is focused on the merits of petitioners' claims, the source of the plaintiffs' right to maintain this action is a puzzle. This is not an enforcement proceeding, and no act of Congress confers a right of action directly or by implication. *See Alexander v. Sandoval*, 532 U.S. 275 (2001). Petitioners cannot sue under the Administrative Procedure Act ("APA") because the Board is not an agency, *see* 15 U.S.C. § 7211(b), and thus its actions are not agency action for APA purposes. *See* 5 U.S.C. § 702. Petitioners invoked the Declaratory Judgment Act ("DJA") in their complaint, *see* J.A. at 49, but the DJA does not provide a cause of action. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950). Nor does *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 19 & n.19 (1983)— whatever its reach—assist petitioners because the Board itself cannot directly bring an "arising under" coercive action in federal court.

This Court has in one context ignored the requirement that a right of action must exist: Claims by plaintiffs that federal statutes preempt state statutory law. R. Fallon, et. al., Hart & Wechsler's, The Federal Courts and the Federal System 806-807 (6th ed. 2009). Such holdings have been criticized from their outset. *See* Henry Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 Colum. L. Rev. 233, 239-240 (1991). In any event, to our knowledge, these cases have never been extended to the separation of powers context. This case is a particularly inauspicious occasion for such a notable extension, given that the Act *does* provide a remedial mechanism by which petitioners can obtain relief, but requires that they first appeal their claims against the Board to the SEC and then, if necessary, obtain judicial review of the SEC's decision in federal appellate court. *See* 15 U.S.C. §§ 78y, 7217(c); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207-09, 213-16 (1994) (holding that a similar process for obtaining administrative and subsequently judicial review precludes district court jurisdiction over a pre-enforcement challenge, including over petitioner's constitutional due process claim). Indeed, as the United States argues, *see* U.S. Br. at 15-19, a strong case can be made that this statutory review mechanism is exclusive.

constitutional text is far less certain and includes few details on the government's administrative structure. *See* Jerry L. Mashaw, *Governmental Practice and Presidential Discretion: Lessons from the Antebellum Republic?*, 45 Willamette L. Rev. 659, 659-61 (2009). Key terms are ambiguous, prime among these being "executive power," which could be read as encompassing all political and administrative functions or instead some subset of core executive responsibilities, such as the conduct of foreign affairs. *See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L. J. 1725, 1788-92 (1996); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 38-70 (1994). Similarly, assignment to the President of responsibility to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, surely supports some presidential supervisory or oversight role, but that Clause is compatible with a range of interpretations about the scope of such presidential oversight. *See* Strauss, *supra*, at 648-50.

Several provisions that the Constitution does contain are hard to square with claims of unlimited presidential power to remove executive officers. Of particular note is the Opinion Clause, authorizing the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective offices." U.S. Const., art. II., § 2. To be sure, the Clause supports the inference that the President enjoys some supervisory authority over the executive branch; he can at least demand reports from principal officers heading executive branch departments. As a result, Congress cannot fully insulate a department from

all presidential oversight. But the limited scope of the Opinion Clause—which allows the President to request opinions, as opposed to direct decisions or otherwise instruct principal officers—is more in keeping with an effort to ensure some minimum threshold of presidential supervision than one creating unlimited presidential control. *Cf. Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) (ruling that a presidential directive is no defense to a claim that the Secretary of the Treasury violated his statutory duties). Indeed, the very fact that the Opinions Clause is included at all weighs strongly against efforts to read Article II's Vesting and Take Care Clauses as granting the President unlimited authority over executive branch officers. If these clauses granted the President such extensive power on their own, the Opinion Clause would be unnecessary. *See* Lessig & Sunstein, *supra*, at 32-38, 72.

Unlimited presidential authority to remove executive officers is also at odds with constitutional provisions granting Congress broad power over the structure of the executive branch. Most prominently, Article I provides that Congress "shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. As this Court ruled early on, "necessary" and "proper" are properly read here as terms of empowerment. *McCulloch v. Maryland*, 17 U.S. 316, 411-21 (1819). One manner in which Congress can wield this broad authority is by imposing removal restrictions on executive officials.

Similarly, Congress is granted authority to "by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., art. II, § 2. Even with respect to principal officers, the President cannot even appoint them on his own, but must obtain Senate advice and consent. *See id.*

Strikingly, no textual provision expressly grants the President power to remove executive officers. The only express reference to executive officers' removal is the requirement that "all civil Officers of the United States, shall be removed from Office" following impeachment and conviction, U.S. Const., art. II, § 4, which is a removal power controlled by Congress. Even under the longstanding presumption that the power to appoint carries with it power to remove, constitutional protection for direct presidential appointment extends only to principal officers. U.S. Const., art. II, § 2; *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259-60 (1839). Nothing in the text of the Constitution therefore precludes Congress from limiting the President's role in the removal of inferior officers.

These textual clues, though admittedly open to debate, appear on the whole to grant Congress broad authority to create independent agencies and impose conditions on the President's power to remove executive officials. At a minimum, this constitutional text cannot be read as mandating at-will or direct presidential removal power over all persons exercising executive authority. That reading simply ignores too much textual ambiguity and contradictory language to be plausible.

Nor does the separation of powers doctrine necessitate such a conclusion. Constitutional separation of powers principles require that the President be able to oversee those wielding executive authority, because lack of any oversight capacity might "prevent[] the Executive Branch from accomplishing its constitutionally assigned function[]" of ensuring that the laws be faithfully executed. *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977); *see also* Strauss, *supra*, at 597, 602. But any number of methods exist by which such presidential oversight could be secured short of an unlimited power of removal—several of which, including presidential selection of principal officers and authority to obtain a statement of their opinions, are explicitly constitutionally provided, whereas removal is not. To be sure, some principal officers of the executive departments may be such "high political officer[s]" and so closely tied to the President that the President's ability to remove them at will "might conceivably be deemed indispensable to democratic government." *Myers v. United States*, 272 U.S. 52, 247, (1926) (Brandeis, J., dissenting); *cf. Marbury v. Madison*, 1 Cranch. (5 U.S.) 137, 166 (1803) (noting that some officers are "to conform precisely to the will of the President" and "their acts are his acts"). Yet that possibility falls well short of a constitutional mandate for unlimited presidential removal power for all executive officers. *See Myers*, 272 U.S. at 247.[4]

4. This case, of course, does not raise any question concerning the removal of principal officers within an executive department.

Unlimited presidential removal power is also not necessary to guard against congressional aggrandizement. Petitioners repeatedly contend that restrictions on presidential removal, such as the for-cause protections that shield members of independent agencies, are unconstitutional because they grant Congress control over execution of the laws and executive officers. Pet. Br. at 19-23, 30-34. Whether removal restrictions in fact increase congressional influence is an empirical question, and recent scholarship suggests that the impact of such measures depends on the vagaries of party politics. *See* Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. Rev. 459, 477-79, 485-95 (2008).

Regardless, petitioners' argument presumes a level of insulation and separation among the branches that is simply not reflective of our constitutional structure. As this Court has frequently remarked, although the Constitution "divide[s] the delegated powers of the new federal government into three defined categories, legislative, executive, and judicial," *INS v. Chadha*, 462 U.S. 919, 951 (1983), it "by no means contemplates total separation of each of these three essential branches of Government," *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). "[The Constitution] enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). This is, of course, very old teaching. *See* The Federalist No. 47 at 269-76 (James Madison) (Clinton Rossiter, ed., 1999).

Recognizing that "our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence," *Mistretta v. United States*, 488 U.S. 361, 381 (1989), this Court has rejected efforts by Congress to keep for itself a direct role in the removal of executive officers as unwarranted aggrandizement. *See Bowsher v. Synar*, 478 U.S. 714, 722-23 (1986); *Buckley*, 424 U.S. 135-37; *Myers*, 272 U.S. at 161; *see also Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991). But the Court has repeatedly upheld the constitutionality of measures that accrue power to Congress more indirectly and rejected claims that such measures represented "an attempt by Congress to increase its own powers at the expense of the Executive Branch." *Morrison v. Olson*, 487 U.S. 654, 694 (1988); *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856-57 (1986); *Nixon*, 433 U.S. at 442-46, 452-55.

Perhaps the clearest lesson here is that it may be difficult to extract definitive guidance on the scope of the President's removal power from an exegesis of constitutional text and structure. Such guidance simply does not exist. Instead, the removal power represents a paradigmatic example of Hamilton and Madison's recognition that it would take time to "liquidate the meaning of all the [Constitution's] parts, and . . . adjust them to each other in a harmonious and consistent WHOLE." The Federalist No. 82 *(Alexander Hamilton)*, *supra*, at 459; *see also* The Federalist No. 37 (James Madison), *supra*, at 197. In Caleb Nelson's words, the "founders did not consider the Constitution's

meaning to be fully settled at the moment it was written. They recognized that it contained ambiguities and that subsequent interpreters would help 'fix' its meaning on disputed points." Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 521 (2003). As the following discussion demonstrates, such "liquidation" and "fixing" has occurred, and this Court's precedents have established that the Constitution does not grant the presidential unlimited removal authority over all executive officials.

B. Unlimited Presidential Removal Power Is Inconsistent with Longstanding Precedent

This Court's longstanding and deeply entrenched precedent establishes that the President does not enjoy a constitutionally-protected authority to remove at will all persons exercising executive power. Indeed, the claim that the Constitution grants the President such power finds no support whatsoever in the volumes of the Court's reports. Similarly unsupported is the assertion that the President or an alter ego must have some direct or immediate removal power over all executive officials, including inferior officers.

This Court has repeatedly and consistently upheld congressional limitations on the President's power to remove executive officers at will. Perhaps the earliest clear example is *United States v. Perkins*, 116 U.S. 483 (1886), in which this Court unanimously upheld a restriction on the President's power to remove an inferior officer whose appointment was vested in a department head: "We have no doubt that when congress, by law, vests the appointment of inferior

officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest." *Id.* at 485; *see also Marbury*, 1 Cranch. (5 U.S.) at 157, 162 (concluding that an officer appointed by the President with Senate consent for a term appointment was not removable at will and had a right to his commission).

Perkins left open whether Congress could also limit the President's power to remove principal officers, but this Court subsequently answered that question affirmatively (at least for some such officers) in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). There, the Court stated: "We think it plain under the Constitution that illimitable power of removal is not possessed by the President" with respect to "members of quasi legislative and quasi judicial bodies," such as the Federal Trade Commission. *Id.* at 629. In *Wiener v. United States*, the Court again rejected a claim of inherent executive power to remove at will, in this case holding that "no such power is given to the President directly by the Constitution" with respect to the War Claims Commission, statutorily charged with adjudicating compensation claims connected to World War II. 357 U.S. 349, 356 (1958).

More recently, the Court strongly reaffirmed the constitutionality of limitations on the President's removal power in *Morrison v. Olson*, dismissing out-of-hand the suggestion that "the language of Article II vesting the executive power of the United States in the President requires that every officer of the United States exercising any part of [the executive] power must serve at the pleasure of the President and be removable

by him at will." 487 U.S. at 690 n.29. Such a "rigid demarcation—a demarcation incapable of being altered by law in the slightest degree, and applicable to tens of thousands of holders of offices neither known nor foreseen by the Framers—depends upon an extrapolation from general constitutional language which we think is more than the text can bear," the Court cautioned. *Id.* *Morrison* left no doubt about its agreement with the holdings in *Perkins*, *Humphrey Executor*, and *Wiener*, questioning only *Humphrey's Executor's* assignment of determinative significance to the type of function an official performed. *Id.* at 689-91 & n.29. Adopting a more flexible inquiry, the Court in *Morrison* upheld the for-cause removal protections applicable to the Office of the Independent Counsel, emphasizing the Counsel's status as an inferior officer and other limitations on the Counsel's authority. *Id.* at 691-93, 695-96.

In other instances, this Court has accepted the constitutionality of removal restrictions without question. *See Mistretta*, 488 U.S. at 410-11 (emphasizing limitations on the President's power to remove members of the Sentencing Commission in upholding the latter's constitutionality); *cf. Buckley*, 424 U.S. at 141. Even strong supporters of broad presidential removal power have acknowledged the extent to which independent agencies are now interwoven into the fabric of the federal government. *See Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 918-22 (1991) (Scalia, J., concurring in part and concurring in the judgment). On the few occasions when the Court has rejected challenges brought by individuals who have been removed by the President, it has carefully emphasized

that its rulings rest on constructions of the statutes at issue, and not on a constitutional basis. *See, e.g.*, *Shurtleff v. United States*, 189 U.S. 311, 316-18 (1903); *Parsons v. United States*, 167 U.S. 324, 334, 342-43 (1897).

Thus, far from being a constitutional outlier, *see* Con. Law Acad. Br. at 1, *Morrison* is simply the latest in a long line of decisions upholding the constitutionality of for-cause removal restrictions. Even *Myers*, the decision most commonly invoked by advocates of unlimited presidential removal power, *see, e.g.*, Con. Law Acad. Br. at 3-4, 6, 17-18, falls well shy of their mark. *Myers*, which invalidated a requirement of senatorial consent for removal of a presidentially-appointed inferior officer, expressly refused to call into question *Perkins'* holding that Congress could limit removal of *certain* inferior officers and recognized that Civil Service Act limitations on removal were valid. *Myers*, 272 U.S. at 160-62, 173-74. *Myers* simply insisted that "Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent." *Id.* at 164; *see also id.* at 174 ("If such appointments were vested in the heads of departments to which they belong, they could be entirely removed from politics.").

A decision by this Court holding that the President enjoys at-will removal power over any person exercising executive power would necessitate overruling this long line of precedent, as petitioners' amici acknowledge and urge. No justification exists for such a profound disruption of our settled constitutional understandings.

These decisions have not proved practically unworkable; they are fully consistent with current separation of powers analysis; and they are not called into question by changed factual understandings. Most importantly, as discussed below, this precedent underpins the shape of our modern governmental regulatory arrangements. This Court has repeatedly underscored the fundamental importance of the doctrine of stare decisis and refused to overrule precedent, even in constitutional cases, absent a "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Such special justification is wholly lacking here.

No doubt it was concern about this disruptive potential that led the dissenting judge below to insist that the removal protections for Board members could be invalidated without calling this Court's established jurisprudence into question, on the ground that here neither the President nor a presidential alter-ego is directly involved in removing members of the Board. Pet App. 65a-69a. Such a situation, the dissenting judge maintained, was unique, a claim petitioners repeat here. *See id.* at 43a, 80a; Pet. Br. at 25. But the lack of such a direct presidential role is *not* unique to the Board. It exists as well with respect to those independent agencies that by statute have power to hire and remove their agencies' inferior officers and other subordinates. *See, e.g.*, 7 U.S.C. §§ 2(a)(4), 2(a)(5), 2(a)(7)(A) (Commodities Futures Trading Commission); 15 U.S.C. §§ 2053(g)(1)(A)-(B) (Consumer Product Safety Commission); 42 U.S.C. §§ 5843(a), 5844(a), 5845(a), 5849(a) (Nuclear Regulatory Commission). The heads of the independent agencies are by definition not presidential alter egos because they are not removable

by the president at will. As a result, no immediate involvement by the President or a presidential alter ego is present in these agencies' hiring and removal decisions; rather, the President exercises control through the regular chain of command. *See* Board Br. at 12, 14, 36-45.

Moreover, the dissent's argument proceeds on the unspoken—but erroneous—assumption that the Board members are principal officers. Under current precedent, however, the Board members must be deemed inferior officers in light of the SEC's extensive supervision of the Board. *See* Part II.B., *infra*. Regardless, if Board members are principal officers, then no reason exists to consider the removal limitations at all; the Act's mechanism for selecting Board members would plainly violate the text of the Appointments Clause. U.S. Const., art. II, § 2. Hence, there is no need in this case to address the question of whether the President must have some direct ability to remove principal officers for cause. The President already enjoys such removal power with respect to the only principal officers at issue, the Commissioners of the SEC.

Petitioners' insistence that the President directly wield removal authority is in considerable tension with longstanding precedent emphasizing that Congress may limit the removal of inferior officers whose appointment it has vested in the heads of departments. *See Perkins*, 116 U.S. at 485 (Congress may "limit and restrict" removal of such inferior officers "*as it deems best for the public interest*") (emphasis added); *Ex parte Hennen*, 38 U.S. at 260 ("[T]he President has certainly *no power* to remove . . . . that class of inferior officers, the appointment of which the Constitution authorizes Congress to vest in the head of the department.") (emphasis added). Nor is there any reason for the Court to imply a constitutional requirement

of an immediate removal power when it has repeatedly upheld the constitutionality of for-cause removal restrictions. Such a rule would undermine the very independence that for-cause removal provisions seek to achieve. Thus, even the ostensibly more modest claim for a direct role in removal is wholly incompatible with this Court's precedent sustaining independent regulatory agencies. *Cf. Freytag*, 501 U.S. at 920-23 (Scalia, J.).

Petitioners and the dissenting judge below also fundamentally mistake this Court's jurisprudence insofar as they contend that some direct presidential role in the removal of inferior officers is categorically required for an administrative structure to be constitutional. This Court has clearly eschewed categorical rules and formal requirements in analyzing the constitutionality of removal limitations that do not give Congress a direct role. "The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President." *Morrison*, 487 U.S. at 689; *see also United States v. Nixon*, 418 U.S. 683, 707 (1974) (rejecting an absolute rule of executive privilege against subpoenas).[5]

5. Such rejection of categorical lines and insistence on contextual analysis is not limited to presidential power cases; rather, it is a prominent feature of this Court's separation of powers decisions more generally. *See, e.g., Boumediene v. Bush*, 128 S. Ct. 2229, 2252-59 (2008) (rejecting a categorical rule that would determine the availability of the constitutional writ of habeas corpus based solely on whether the United States exercised de jure sovereignty over a territory, and adopting instead a multi-factored analysis).

Hence, as this Court has said repeatedly, "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691; *see also id.* at 689-90; *accord*, *Mistretta*, 488 U.S. at 383 (describing the "inquiry as focusing 'on the extent to which [a provision of law] prevents the Executive Branch from accomplishing its constitutionally assigned functions'" (quoting *Nixon*, 433 U.S. at 443 (insertion in original))); *see also Loving v. United States*, 517 U.S. 748, 757 (1996) ("Even when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties."). The removal protection at issue here accordingly must be considered in the context of the other statutory measures that provide for substantial oversight and control of the Board. *See infra* Point II.A.

C. Unlimited Presidential Removal Power Is Inconsistent with Government Practice and Modern Administrative Government

Acceptance of restrictions on presidential removal power is not only deeply embedded in precedent. Such acceptance also represents a basic feature of the federal government's current structure and underlies the substantial growth in administrative government that occurred over the course of the last century.

Petitioners' academic amici devote a large portion of their brief to the claim that our nation's historical practices reveal a shared understanding that the

removal power is vested in the President. *See* Con. Law Acad. Br. at 12-19. In fact, the historical record is far more nuanced and complex than amici admit. Numerous examples exist of early administrative structures that appeared to limit presidential control over the executive branch, for instance by emphasizing congressional oversight and the independent discretion of executive officials or by incorporating private actors. *See* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations*, 1787-1801, 115 Yale L. J. 1256, 1284-96 (2006); *see also* Lessig & Sunstein, *supra*, at 15-21, 26-32. Even the fabled Decision of 1789, on which petitioners and their amici put great weight, *see* Pet. Br. at 27-28; Con. Law Acad. Br. at 13-14, is quite ambiguous, and to this day scholars debate its import. In particular, the Decision sheds little definitive light on the central question here, namely, the circumstances in which Congress can impose statutory constraints on the removal power. *See* David P. Currie, The Constitution in Congress: The Federalist Period, 1789-1801 at 41 (1997); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021, 1073 (2006). Moreover, measures imposing limitations on the President's removal power continued to be proposed and occasionally adopted throughout the nineteenth century. *See* Stephen G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* 172, 192, 257-58, 263 (2008).[6]

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6. In their amici brief, several former attorneys general emphasize the extent to which Presidents have resisted congressional efforts to limit the removal power. *See* Br. of William P. Barr et al. at 18-25. Of course, "presidential defense of executive prerogative is no more determinative than

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Most importantly, the claim that our nation's practice supports at-will presidential removal power over all persons exercising executive power is incompatible with administrative and political developments in the modern era—developments that amici's brief essentially ignores. Starting in the late nineteenth century, Congress enacted numerous restrictions on presidential appointment and removal powers, from adoption of the civil service to creation of the so-called independent agencies headed by officials removable only for cause. *See* Civil Service Act of 1883 (Pendleton Act), ch. 27, 22 Stat. 403; Interstate Commerce Act of 1887, ch. 104, § 11, 24 Stat. 379, 383; Federal Reserve Act of 1913, ch. 6, § 10, 38 Stat. 251, 260; Federal Trade Commission Act of 1914, ch, 311, § 1, 38 Stat. 717, 718. Even if early measures of this sort were not thought to significantly constrain the President's removal discretion, *see* Calabresi & Yoo, *supra*, at 220-21, 258-59; *but see Perkins*, 116 U.S. at 485 (enforcing protections against dismissal), that effect became increasingly clear over time. *See, e.g.*, *Humphrey's Ex'r*, 295 U.S. at 631-32; *Wiener*, 357 U.S. at 356. Yet Congresses continued to enact and Presidents to sign statutes creating new independent entities and offices. *See, e.g.*, 15 U.S.C. § 2053(a) (Consumer Product Safety Commission, created in 1972); 42 U.S.C. § 7171(b)(1) (Federal Energy Regulatory

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congressional challenges to presidential power." Mashaw, *Governmental Practice*, *supra*, at 669. In addition, most of the examples amici list involve either principal officers or presidentially-appointed inferior officers, which are not clearly analogous to members of the Board.

Commission, created in 1977); *see also* 5 U.S.C. §§ 1202(d), 1211(b) (Merit Systems Protection Board and the Office of Special Counsel, created in 1978).

Today, removal protections for executive branch officials and employees are a pervasive feature of the federal landscape. Examples include not just the numerous independent agencies, but in addition the civil service, administrative judges, and any number of other executive branch positions that Congress has determined necessitate the greater insulation and independence that removal protections afford. Currently, only a very small proportion of federal workforce serves on a truly at-will basis; the rest enjoy some form of removal protection.[7] These protections are

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7. Precise counts of the number of at-will federal government employees are not easily available. Almost all employees not in policy or supporting positions enjoy some form of protection against at-will employment termination, including probationary employees. *See, e.g.*, 5 C.F.R. § 315.806 (substantive and procedural protections for probationary employees); David E. Lewis, The Politics of Presidential Appointments: Political Control and Bureaucratic Performance 20-25 (2008) (describing the modern federal personnel system). As a result, one approach to estimating a count of at-will employees is to add together the number of policy and supporting positions in the federal government that are subject to noncompetitive appointment. Using data from the "Plum Book," S. Comm. On Homeland Security and Governmental Affairs, 108th Cong., 2d Sess., United States Government Policy and Supporting Positions at app. 1 (Comm. Print 2008), available at: *http:// www.gpoaccess.gov/plumbook/ 2008/* index.html (last visited Oct. 16, 2009), this yields a total of 7,996 at-will employees. This number is extremely generous, however,

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not limited to lower-level employees, but often encompass officials exercising significant policy discretion, such as administrative law judges or officials in the Senior Executive Service (SES).[8] Independence protections are particularly prevalent in the area of financial regulation, with many of the nation's central financial regulators—the Federal Reserve, the SEC, and the CFTC, for example—enjoying insulation from presidential removal. *See, e.g.*, 12 U.S.C. § 241 (members of the Federal Reserve are appointed to fourteen year terms).

The destabilizing potential of a decision upholding unlimited presidential removal power is therefore enormous. Basic features of the modern federal administrative state and our systems of financial regulation would suddenly be called into constitutional question. Moreover, the broad delegations of regulatory authority that characterize our contemporary

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as it includes 3,723 career SES employees who enjoy some removal protection as well as presidential appointees protected by for-cause provisions. Even this generous count represents only 0.4% of the current federal civilian workforce, listed at 1.92 million in March 2009. *See* http://www.fedscope.opm.gov/employment.asp (last visited Oct. 16, 2009).

8. Although members of the SES can be transferred from their positions after a certain period, they cannot be removed from federal employment and federal law significantly limits the number of SES slots that can be occupied by political appointees. *See* 5 U.S.C. § 3132(a)(2); 5 C.F.R. part 359 (removal grounds and protections for SES career appointees); *see also* Lewis, *supra*, at 23.

government were made against a background in which Congress' ability to provide executive branch officials with some insulation from total presidential control was not in doubt. To so dramatically change course now would undercut Congress's legitimate reliance on this Court's well-established precedent.

D. Petitioners' Challenge Threatens Congressional Efforts to Enhance the Accountability of Private Regulation

Petitioners' claims for at-will or direct presidential removal power also hold troubling implications for the public-private regulatory cooperation that pervades the financial sector. If embraced by this Court, petitioners' rigid understanding of separation of powers could significantly impede congressional efforts to make such regulatory arrangements more accountable. Indeed, it might even call into question the constitutionality of much current private regulation. The potential for disruption in this area of vital national regulation is vast.

Reliance on private regulation has been an essential feature of our securities laws, which have long incorporated self-regulation by private organizations such as the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD), the latter now known as the Financial Industry Regulatory Authority (FINRA).[9] *See* 15 U.S.C. § 78s; *see also id.* § 78o-4(b) (Municipal Securities Rulemaking Board,

9. NYSE merged its member regulation, enforcement and arbitration functions with NASD in 2007, and these functions are now performed by FINRA.

composed of public, broker-dealer, and bank representatives). To address constitutional concerns that private regulators could use their delegated authority to advance their own self-interested goals over the public interest, *see, e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), this Court has required that private delegates be formally subject to governmental oversight, *see Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399-400 (1940). But it has not inquired into whether such oversight is meaningful in practice, leaving a risk that private delegates who are not governmental actors will be able to wield their delegated powers subject only to nominal governmental supervision and outside of the constitutional constraints that ordinarily attach to exercises of governmental power. *See* Gillian E. Metzger, *Privatization As Delegation*, 103 Colum. L. Rev. 1367, 1439-45 (2003).

Prior to the creation of the Board, accountants were subject to a system of self-regulation under which the SEC deferred to private professional bodies to set the accounting and auditing standards governing securities issuers' financial statements and to undertake oversight of accounting firms. This self-regulatory approach came under heavy criticism for weak standards, unduly lax enforcement, and evident conflicts of interest, with the private regulators dependent on voluntary contributions from the accounting industry to support their activities. *See* Br. of Former SEC Chairmen at 6-10; S. Rep. No. 107-205 at 4-6, 13 (2002). Congress responded by creating the Board to oversee audits of publicly-traded companies in lieu of purely private regulators. It decided that the Board should be subject to extensive SEC oversight, while also seeking to integrate some

aspects of a private regulatory approach (for example, by denominating the Board a private not-for-profit corporation to ensure greater salary freedom). S. Rep. No. 107-205 at 2, 6-7; Board Br. at 3-4; Br. of Former SEC Chairmen at 10-14.

Congress' approach here secures far greater accountability than simply relying on pre-existing private self-regulatory organizations. Significantly, as a government-created and government-controlled corporation, the Board is a governmental actor for constitutional purposes and thus acts subject to constitutional requirements, a point the parties do not dispute here. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 394-99 (1995); *see also* Pet. Br. at 9 n.1; U.S. Br. at 29 n.8; Board Br. at 18. In addition, the fact that it is a government-created entity, with its members chosen and removable by government officers and required to work for the Board full-time, serves to reinforce the Board's "inherently governmental mission." Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 Notre Dame L. Rev. 975, 1007-08, 1025 (2005). The Board's orientation toward the public interest is further reinforced by its extensive supervision by the SEC. 15 U.S.C. § 7217. Although petitioners' amici rightly note the dangers of lack of transparency and public accountability often associated with private regulation, *see* Securities Law Acad. Br. at 1-2, those dangers are mitigated here by the Board's status as a government-created and government-controlled entity.

Petitioners' challenge would erect substantial obstacles to congressional efforts to devise more

accountable forms of public-private regulatory cooperation. In essence, petitioners insist that the Constitution requires Congress to choose between delegating regulatory authority to a purely private entity or vesting it in a traditional public agency. The Constitution should not be interpreted to deny Congress reasonable middle ground for regulatory experimentation. It would be perverse indeed if separation of powers principles were read as punishing Congress for adopting an approach that improves public accountability and helps ensure that governmental power is not exercised outside of constitutional constraints.

Petitioners' claims could have even more dramatic implications for private regulation. Although officers of private securities self-regulatory organizations such as NYSE and FINRA are removable by the SEC on similar terms as members of the Board, the President's appointment authority over such private bodies is much more curtailed. Whereas principal officers appointed by the President in turn appoint Board members and can remove them for cause, no government official can directly appoint the officers of private self-regulatory organizations. *See* 15 U.S.C. § 78s(h)(4); Nagy, *supra*, at 1024-25. Moreover, by statute these entities are expressly entrusted with rulemaking, investigative and disciplinary responsibilities that closely resemble those of the Board, and they are subject to similar, albeit less extensive SEC oversight. *See* 15 U.S.C. §§ 78q(a)-(b),(d); *id.* § 78s; *see also id.* §§ 7217(a)-(c) (incorporating provisions authorizing SEC oversight of registered securities associations to apply to SEC oversight of the Board). If such functions necessitate presidential

appointment and removal in the context of the Board, the existing limitations on the President's appointment and removal powers in private regulatory contexts would seem hard to justify. Trying to ground this distinction in the Board's government-created status would allow "the political branches . . . to switch the Constitution on or off," *Boumediene*, 128 S. Ct. at 2259, based on a formality that is unrelated to the statutorily-delegated powers these private regulators enjoy.

II. The Statutory Provisions Governing Removal and Appointment of Board Members Are Plainly Constitutional under this Court's Governing Precedent

A. The Removal Provisions Are Clearly Constitutional In Light of the SEC's Comprehensive Supervision of the Board

As shown above, our constitutional understanding accepts congressional restrictions on the President's removal power provided they do not impede the President's ability to discharge his responsibilities under the Take Care Clause or directly involve members of Congress in the removal process. This constitutional understanding was not inevitable; the constitutional text could perhaps have supported petitioners' view that the President should have unlimited removal power. But that was not the understanding our nation came to adopt. Indeed, at no point in time was it the national understanding. Now, in the face of longstanding precedent and a government constructed on the assumption that Congress can shield many executive branch officials from at-will presidential removal, it is in

fact a radical argument to suggest that the Court (and the country) should abruptly change course.

Thus, the appropriate inquiry in assessing the constitutionality of the restrictions on removal of Board members is whether they hinder the President's execution of his constitutional functions. *See* Pet. Br. at 18; U.S. Br. at 46-47; Board Br. at 47. Petitioners' claims plainly fail under this analysis given the comprehensive oversight of the Board by the SEC, whose members are themselves removable by the President for cause.

As the majority below noted, the degree of SEC supervision of the Board is extraordinary. *See* Pet. App. 7a. The SEC must approve the Board's rules, which include not just the Board's "bylaws and rules," but also "those stated policies, practices, and interpretations of the Board" that the SEC deems to be Board rules. 15 U.S.C. §§ 7201(13), 7217(b). The Board must notify the SEC of any investigation of possible securities laws violations, and the SEC has power to "enhance, modify, cancel, reduce, or require the remission" of any Board sanction imposed on an accounting firm or its personnel. *Id.* §§ 7215(b)(4), 7215(d), 7217(c). The SEC can review such sanctions on its own motion as well as on request by those aggrieved by the Board's action. *Id.* § 78s(d)(2), *incorporated by id.* § 7217(c)(2). The Board's budget and the annual fees imposed on issuers to fund the Board's activities must be approved by the SEC. *Id.* § 7219. The SEC appoints Board members, can remove or censure them "for good cause shown," *id.* §§ 7211(e)(4), 7211(e)(6), can "relieve the Board of any [enforcement] responsibility," *id.* § 7217(d)(1), and can "impose limitations upon the activities, functions,

and operations of the Board, *id.* § 7217(d)(2). On top of this, the SEC has broad independent authority to issue rules itself that it deems "necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act," *id.* § 7202, and such SEC rules would then be substantive law that binds the Board.

In short, the SEC exercises comprehensive oversight of the Board. Petitioners attempt to portray the SEC's role as far more limited, arguing that the SEC does not oversee the Board's investigative and enforcement decisions prior to imposition of a sanction. Pet. Br. at 53-54. In fact, the SEC has greater powers over the Board's investigation and enforcement activities than petitioners acknowledge, because the Act requires the Board to "establish, by rule, . . . fair procedures for the investigation and disciplining of public accounting firms" or their personnel, and such Board rules cannot go into effect until approved by the SEC. 15 U.S.C. §§ 7215, 7217(b). The Board must apply to the SEC for a subpoena to compel document production or testimony. *Id.* § 7215(b)(2)(D). Moreover, the Act provides that the Board must submit its written inspection reports of public accounting firms to the SEC and that a firm which disagrees with the Board's report can obtain SEC review. *Id.* §§ 7214(g), (h).

In any event, some ground-level investigatory and enforcement discretion does not distinguish the Board from divisions of the SEC or indeed divisions in other executive branch agencies. The norm, as evidenced in the APA's provisions for formal adjudication, is for initial decisions to be made by agency employees presiding

over adjudicatory proceedings, subject to appeal to and de novo review by the agency head. *See* 5 U.S.C. §§ 556(a), 557(b); 15 U.S.C. § 78d-1 (authorizing SEC to delegate any of its functions to a single commissioner, division, employee, or ALJ, subject to subsequent opportunity for review by the full commission). Like the Board, agency employees and officers undertaking such initial decisionmaking often enjoy some form of removal protection. *See, e.g.*, 5 U.S.C. §§ 554(a), 7521 (removal protection for administrative law judges).

Petitioners additionally claim that Board members enjoy greater removal protection under the Act than that afforded other government officers who can only be removed for cause and that the SEC has only limited ability to reject Board rules. *See* Pet. Br. at 29-30, 39-40, 53, 55. Such statutory arguments are, however, clearly premature. Because of petitioners' decision to bypass administrative proceedings and file this constitutional challenge directly in court, the SEC has not had an opportunity to offer its interpretation of its oversight authority under the Act. Nor, moreover, do these provisions on their face mandate petitioners' narrow reading, particularly if such a reading might raise constitutional concerns. *See Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S.Ct. 2504, 2513 (2009).

B. Board Members Are Inferior Officers and Their Appointment by SEC Commissioners Is Constitutional

Given the SEC's extensive oversight of the Board, *see supra* Point II.A, petitioners' Appointments Clause claims are likewise unavailing. Board members are

inferior officers under the test set forth in *Edmond v. United States*, 520 U.S. 651 (1997), because their "work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate." *Id.* at 663. *Edmond* is particularly instructive for its insistence that restrictions on review by principal officers do not preclude a finding of inferior officer status; instead, "[w]hat is significant is that [inferior officers] have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers." *Id.* at 665. This central condition of inferior officer status obtains here, given the SEC's review of Board determinations and other Board actions.

Finally, petitioners' contentions that the SEC does not qualify as a department for Appointments Clause purposes and that the head of the SEC is its Chair, not the full Commission, are unpersuasive, as even the dissenting judge below acknowledged. *See* Pet. App. at 97a n.24. Nothing in the Constitution's text mandates reading "department" so narrowly as to require cabinet status or otherwise excluding independent agencies. Instead, as Justice Scalia argued for four justices concurring in *Freytag v. Commissioner of Internal Revenue*, "the word must reasonably be thought to include all independent establishments [in the executive branch]," 501 U.S. at 918, and the SEC is such an independent establishment. Although it took a perhaps unduly narrow view of the meaning of "department," the majority in *Freytag* expressly left open the question of whether independent agencies are departments for purposes of the Appointments Clause, *see id.* at 887 n.4, so this Court need not overrule *Freytag* in order to hold that the SEC is a department.

Moreover, denying independent agencies department status—and thus denying them authority to appoint inferior officers—would have the same disruptive effects as denying the constitutionality of for-cause removal protections. Petitioners' claim is therefore simply a backdoor effort to eliminate independent agencies, notwithstanding that the Court upheld the constitutionality of such agencies in *Humphrey's Executor*. The Constitution should not be contorted in this fashion; we should not presume that the framers "hid[] elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). Instead, as Justice Scalia wisely acknowledged in *Freytag*, "adjusting the remainder of the Constitution to compensate for *Humphrey's Executor* is a fruitless endeavor." 501 U.S. at 921. The Appointments Clause envisions that "[p]rincipal officers could be permitted by law to appoint their subordinates. That should subsist, however much the nature of federal business or of federal organizational structure may alter." *Id.* at 920. Here, this sensible principle means that the SEC should be able to appoint its inferior officers, a category which includes members of the Board.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,
Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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INTEREST OF AMICI CURIAE[1]

The Council of Institutional Investors is an organization of public, labor, and corporate pension funds. The Council's membership includes more than 120 pension funds, with assets exceeding $3 trillion, and more than 130 nonvoting members from a broad range of industries. The Council's member funds have fiduciary obligations to millions of Americans whose retirement savings are invested through them. Accordingly, the Council seeks to address investment issues that affect the size or security of plan assets.

As major shareowners, the Council's members have a keen interest in the health and integrity of the American securities market.[2] The Council has explained in a policy statement that "[t]he efficiency of global markets—and the well-being of the investors who entrust their financial present and future to those markets—depends, in significant part, on the quality, comparability and reliability of the information provided by audited financial statements and disclosures." CII Policy on Independence of Accounting and Auditing Standard Setters (updated October 7, 2008), http://www.cii.org/UserFiles/file/council%20policies/Policies%20on%20Accounting%20and%20Auditing%205-7-09.pdf.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certifies that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than the amici or their counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk.

[2] See, *e.g.*, P&I Daily, August 31, 2006 ("Earnings from investment income accounted for 63% of state and local pension system revenue for the 22 years ended Dec. 31, 2004.").

The other amici include members of the Council and other entities interested in investor protection.

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a labor federation comprised of 53 member unions representing approximately 9 million workers. Union-sponsored pension funds have approximately $400 billion in assets, and union members participate in benefit plans with over $5 trillion in assets. The vast majority of these assets are invested in securities traded in the public markets. Through its Capital Stewardship Program, the AFL-CIO advocates for workers' interests as investors and was actively involved in the legislative process that led to the adoption of the Sarbanes-Oxley Act.

The California Public Employees' Retirement System (CalPERS) is the largest state public pension system in the United States with approximately $190 billion under management. CalPERS provides retirement benefits to over 1.5 million public workers, retirees, and their families and beneficiaries.

The California State Teachers' Retirement System (CalSTRS) is the second largest public pension fund in the United States. It administers retirement, disability, and survivor benefits for California's 833,000 public school educators and their families from the state's 1,400 school districts, county offices of education, and community college districts.

CFA Institute is a global membership and educational organization for the investment profession. Its mission is to lead the investment profession globally by setting the highest standards of ethics, education, and professional excellence. CFA Institute administers the Chartered Financial

Analyst and Certificate in Investment Performance Measurement curriculum and exam programs worldwide, publishes research, conducts professional development programs, and sets voluntary ethics-based professional and performance-reporting standards for the investment industry. CFA Institute has nearly 100,000 members, who include the world's 86,000 CFA charterholders, in 131 countries and territories, as well as 136 affiliated professional societies in 57 countries and territories.

The Consumer Federation of America is a nonprofit association of approximately 280 national, state, and local pro-consumer organizations. It was established in 1968 to advance the consumer interest through research, education, and advocacy.

The Public Employees' Retirement Association of Colorado (CoPERA) provides retirement and other benefits to the employees of more than 400 government agencies and public entities in the state of Colorado. Established by state law in 1931, CoPERA operates by authority of the Colorado General Assembly and is administered under Title 24, Article 51 of the Colorado Revised Statutes by a fifteen-member board of trustees.

The Los Angeles County Employees Retirement Association (LACERA) administers and manages the retirement fund for the County of Los Angeles. With over $30 billion in plan assets and 156,000 members, LACERA is the largest county pension fund in the United States. During the last fiscal year, LACERA distributed nearly $2 billion in benefit payments to members and their beneficiaries.

The Nathan Cummings Foundation is rooted in the Jewish tradition and committed to democratic

values and social justice, including fairness, diversity, and community. It seeks to build a socially and economically just society that values and protects the ecological balance for future generations, promotes humane health care, and fosters arts and culture that enriches communities.

The New York State Common Retirement Fund (NYSCRF) is one of the largest public pension funds in the United States. NYSCRF provides pension, disability, and death benefits for New York state and local government employees and employees of certain other participating employers. As of March 31, 2009, NYSCRF had more than one million members, beneficiaries, and retirees and total net assets of approximately $110.94 billion.

The Sacramento County Employees' Retirement System (SCERS) is a public defined benefit retirement system established and administered under the provisions of California's County Employees' Retirement Law of 1937.

Teachers Insurance and Annuity Association-College Retirement Equities Fund (TIAA-CREF) is a national financial services organization and the country's leading provider of retirement services in the academic, research, medical, and cultural fields with $363 billion in combined assets under management as of December 31, 2008. CREF, one of the world's largest institutional investors, holds shares in approximately 5,500 publicly traded companies.

Amici file this brief in support of the Public Company Accounting Oversight Board (PCAOB or the Board), established by the Sarbanes-Oxley Act of 2002, because of that organization's vital role in

restoring and maintaining the investing public's confidence in financial reporting.

Petitioners ask the Court to invalidate as unconstitutional the legislative provisions by which Congress created and empowered the PCAOB. Petitioners and their amici make assertions and arguments regarding the Board's creation and powers. As explained in the Board's brief, the PCAOB sits firmly and comfortably within the long-established constitutional framework of the modern administrative state. Amici seek to provide further information to the Court—in particular, from the perspective of the investing public—regarding the history that led to the creation of the PCAOB, the reality of the Board's operation under the oversight of the Securities and Exchange Commission, and the importance of the PCAOB as structured by Congress to reinstating and preserving investor confidence in the American securities market.

SUMMARY OF THE ARGUMENT

Investors—who now include a majority of American families—rely heavily on honest and accurate financial statements in determining whether to invest in public corporations and how to allocate their capital. By late 2001, the investing public's confidence had been badly shaken by massive corporate scandals involving prominent companies with household names. With the disclosure of wrongs by senior corporate executives and widespread auditing failures involving some members of the accounting profession, investors no longer trusted the information coming from issuers.

The widespread failure by auditors to detect serious management fraud, which shocked American

financial markets, occurred in large part because no one was watching the watchers. The scandals demonstrated the inadequacy of accounting industry self-regulation.

The crisis focused attention on the need for fundamental reform. The intense effort of investors, shareowners, other stakeholders, regulators, and legislators culminated in the passage of the Sarbanes-Oxley Act. The centerpiece of that legislation is the PCAOB—the serious, industry-independent, SEC-accountable regulator that the accounting industry had long needed and always lacked.

The PCAOB's independence from the industry it is charged with regulating is key to its effectiveness. So is its accountability to the SEC and the investing public. The PCAOB's essential powers to promulgate auditing and other rules, inspect accounting firms to assure quality audits, and sanction improper auditor conduct are dependent on both its independence from the industry and its accountability to the SEC.

The history of the PCAOB's current auditing standard for internal control audits—which addresses concerns that arose under its previous standard—illustrates the Board's responsiveness and effectiveness. In developing that standard, the PCAOB and the SEC heeded the concerns of numerous stakeholders to balance the goal of investor protection with that of minimizing unnecessary burdens on business, contrary to suggestions by petitioners' amici that the PCAOB is an unaccountable regulator.

Finally, if the Court finds the provisions for removal of PCAOB members constitutionally flawed,

it should sever those provisions and preserve the Board as Congress intended. The Court should permit the PCAOB to continue its vital role in protecting the investing public.

ARGUMENT

I. THE HISTORY OF SELF REGULATION DEMONSTRATES THAT THE INVESTING PUBLIC NEEDS THE PCAOB TO PROTECT ITS INTERESTS.

Sarbanes-Oxley and the PCAOB incorporate the lessons learned through decades of experience with a deficient system of self-regulation in the accounting profession. The system Sarbanes-Oxley replaced has been described as a "positively Byzantine structure of accounting disciplinary bodies which generally lack[ed] adequate and assured financial support, clear and undivided responsibility for discipline, and an effective system of SEC oversight." Accounting Reform and Investor Protection: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs, 107th Cong. 532 (2002) [hereinafter Accounting Reform Hearings] (testimony of Joel Seligman, Dean and Ethan A. H. Shepley Univ. Professor, Washington Univ. Sch. of Law).

Widespread improper accounting practices first came to the attention of the investing public after the 1929 stock market crash. Final Annual Report of the Public Oversight Board (2001), at 40 [hereinafter POB Final Annual Report 2001]. "Until 1933, the contents of financial statements included in public companies' prospectuses and annual reports were regulated only by some state laws and stock exchanges' listing agreements." Pritchard, The Irrational Auditor and Irrational Liability, 10 Lewis & Clark L. Rev. 19, 28 (2006). Action by the New

York Stock Exchange in 1932 and congressional action beginning with the Securities Act of 1933 required public companies to have annual financial statements certified or audited by independent accountants. POB Final Annual Report 2001, *supra*, at 39-40. "With the adoption of the federal securities laws in 1933 and 1934, auditing of public companies in the United States was placed under the supervision of the Securities and Exchange Commission." Pritchard, *supra*, at 28-29. Oversight of the accounting industry, however, remained the province of the industry's own trade association, the American Institute of Certified Public Accountants (AICPA). POB Final Annual Report 2001, *supra*, at 40. In 1939, the AICPA's Committee on Auditing Procedure issued its first statement setting forth auditing procedure. POB Final Annual Report (2001), *supra*, at 40.

The self-regulatory system instituted in the 1930s continued virtually unchanged for more than four decades, until a new wave of audit failure scandals spurred reexamination in the 1970s. *Ibid.* In 1970, the market was shocked by the collapse, amid financial scandals, of Penn Central Transportation, the largest bankruptcy since the Great Depression. See, *e.g.*, Zeff, How the U.S. Accounting Profession Got Where It Is Today: Part I, No. 3, Vol. 17 Acct. Horizons, Sept. 1, 2003, at 189. Similar financial frauds also brought down companies like Equity Funding and Continental Vending. *Ibid.* In 1974, congressional investigations uncovered further widespread abuses: "unrecorded slush funds, secret bank accounts, and other devices to hide bribes and kickbacks by over 200 major companies. And the cry went out, 'Where were the auditors'?" Lynn Turner, SEC Chief Accountant,

Shifting Paradigms in Self-Regulation: Address at the 27th Anniversary Securities Regulation Institute (Jan. 27, 2000), http://www.sec.gov/news/speech/spch340.htm.

Those events led to a revamping of the regulatory structure in 1977. Despite warnings of the dangers of continued self-regulation and serious consideration given to establishing an industry-independent regulator, the system remained a fragmented scheme in which the regulators and structure were under the control of the accounting industry itself. See Charles Niemeier, PCAOB Board Member, Speech (Nov. 8, 2007), http://www.pcaobus.org/News_and_Events/Events/2007/Speech/11-08_Niemeier.aspx. The AICPA established the SEC Practice Section (SECPS) and the Quality Control Inquiry Committee (QCIC). Framework for Enhancing the Quality of Financial Information Through Improvement of Oversight of the Auditing Process, Securities Act Release No. 8109, Exchange Act Release No. 46120, 67 Fed. Reg. 44964, 44967, 45010 app. A (2002) [hereinafter Framework]; see also U.S. Gen. Accounting Office, GAO-02-411, The Accounting Profession: Status of Panel on Audit Effectiveness Recommendations to Enhance the Self-Regulatory System 7 (2002). The SECPS was charged with overseeing the peer review of auditing firms, and the QCIC investigated allegations of audit failure. Framework, *supra*, at 45010 app. A. An AICPA member firm that performed audits for public companies was required to join the SECPS, meet its standards, and submit to periodic peer reviews. *Ibid.* Also in 1977, the AICPA established the Public Oversight Board (POB). *Ibid.* On paper, the POB was charged with overseeing the activities of the SECPS and the system of peer review. *Ibid.* The

POB, however, depended for its funding entirely on voluntary dues paid by AICPA-member firms that audited public companies and belonged to the SECPS. *Id.*, at 44970. "In addition, the POB lacked the ability to organize and implement its own quality control reviews. And, the POB was not given any authority to sanction auditors for deficiencies or incompetence noted during quality control reviews." *Ibid.*; see also, *e.g.*, Rodrigues, From Loyalty to Conflict: Addressing Fiduciary Duty at the Officer Level, 61 Fla. L. Rev. 1, 39-40 (2009).

After more than two decades, the industry-funded POB and the rest of the self-regulatory regime creaked toward the new century as nominal overseers of an accounting profession radically transformed since 1977. Between 1977 and 2000, the Big Eight accounting firms merged into the Big Five and fees from auditing and accounting, as a percentage of those firms' revenue, decreased from 70 percent to 30 percent. Thomas, Schwab, & Hansen, Megafirms, 80 N.C. L. Rev. 115, 153-155 (2001). That shift reflected the trend by the big auditing firms toward a one-stop-shopping model of providing diverse financial services. See *id.*, at 154-156. The lucrative mix of services audit firms now offered for sale—and pressure on audit partners to cross-sell technology and financial products—was perceived to pose a large, new threat to auditor objectivity.

Moreover, auditing standards were still being set by the industry itself, through the AICPA's Auditing Standards Board, successor to the Committee on Auditing Procedure. That group, composed predominantly of practicing accountants, was criticized for crafting standards that observers perceived as geared more toward protecting its

members' own interests than the investing public. For example, Lynn Turner, former SEC Chief Accountant, testified:

> "One of the problems with that part of the system today is, when they go through that drafting process, since it is all being done by the firms themselves, in fact, their legal counsels get involved in editing those very standards themselves, those standards tend to be written to protect the accounting firms in case they get in trouble on an audit, sometimes probably which is deserved and, quite frankly, sometimes which is not deserved.
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> It is not drafted with the public interest in mind. . . . 'As long as you leave that standard setting process in the hands of the firms and the firm's legal counsel, you are going to get standards written to protect them in court, as opposed to standards written to ensure that they do audits that will protect the public.'" Accounting Reform Hearings, *supra*, at 217 (testimony of Lynn Turner, SEC Chief Accountant, 1998-2001) (quoting Sandy Burton, former Chief Accountant).

Especially in this changed and charged environment, it became clear to most observers that past standard setting and peer review (under POB oversight) were not meeting the stated objective of zealously protecting investors' interests in reliable, transparent financial statements.[3] In 1999 the SEC

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[3] See, *e.g.*, Accounting Reform Hearings, *supra*, at 76 (prepared statement of Harold M. Williams, Former SEC Chairman) ("To

felt compelled to end its endorsement of the peer review process in its Annual Reports to Congress.

Events beginning in 2000 confirmed beyond any doubt the inability of the 1977-vintage self-regulatory structure to effectively supervise the twenty-first century accounting industry, highlighting the need for a truly industry-independent regulator with real power to inspect auditors and enforce compliance. Thousands of violations uncovered at PricewaterhouseCoopers LLP prompted suspicion that similarly widespread noncompliance likely remained to be discovered in other large firms. POB Final Annual Report 2001, *supra*, at 48. Reacting to this crisis of confidence, the POB prepared to undertake intensive special reviews of the Big Five firms. *Ibid.* But the SECPS, under pressure from member firms, stopped the special-review plan in its tracks by cutting off funding to the POB. *Ibid.* When the POB then tried to undertake more limited special reviews, that effort was also thwarted by a lack of cooperation. *Ibid.* "The lesson of this episode is

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my knowledge, there has never been a negative review of a major firm. . . . [P]eer review in its present form becomes too incestuous."); *id.*, at 1116 (prepared statement of Harvey L. Pitt, SEC Chairman) ("[I]t appears that the current system of firm-on-firm peer reviews, overseen by [the POB] . . . has not produced a credible result."); *id.*, at 1035 (prepared statement of Howard M. Metzenbaum, Chairman, Consumer Fed'n of Am. and former U.S. Senator) ("The POB . . . is notable for having never sanctioned a major accounting firm in its 25 years of existence, even when peer reviews have uncovered serious shortcomings in a firm's audit procedures."); *id.*, at 533 (testimony of Joel Seligman, Dean and Ethan A. H. Shepley Univ. Professor, Washington Univ. Sch. of Law) ("[E]ven at its best, [peer review] involves competitors reviewing competitors. The temptation to go easy on the firm you review lest it be too critical of you is an unavoidable one.").

crystal clear: self-regulation by the accounting profession is a bad joke . . . . The firms would never subject themselves to scrutiny unless forced to do so." A. Levitt, Take on the Street 127 (2002).

Then came a spate of major business frauds, scandals, and collapses that involved several prominent companies and that reflected massive audit failures and—in some cases—undetected accounting misconduct. Those events justifiably shook the confidence of the investing public. See, *e.g.*, Editorial, Executives on Trial: Scandal Scorecard, Wall St. J., Oct. 3, 2003, at B1. "The markets were in turmoil, corporations were in disrepute. There was a real fear that the lack of trust in the markets could create long-term problems." Former SEC Commissioner Harvey Goldschmid, quoted in Farrell, Sarbanes-Oxley Has Been a Pretty Clean Sweep, USA Today, July 30, 2007, at 6B. From those ashes rose the legislative will to enact Sarbanes-Oxley—"the most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt." President George W. Bush, Remarks on Signing the Sarbanes-Oxley Act of 2002, 2002 Pub. Papers 1319, 1319 (July 30, 2002)—with the industry-independent yet publicly accountable PCAOB as the centerpiece of a reconstructed regulatory regime. The new structure draws on the many lessons deduced from decades of attempts to allow the accounting industry to regulate itself and that system's demonstrated failings.

II. To Restore and Maintain Justified Investor Confidence in the Securities Markets, the PCAOB Must Be a Strong, Industry-Independent, and Accountable Oversight Authority.

An estimated "fifty-five percent of American families now own stock in public companies," Biggs, Shareholder Democracy, 39 Loy. U. Chi. L.J. 493, 498 (2008), and those families deserve protection. Congress concluded that the key lesson learned from the failure of self-regulation is that independence from the accounting industry is the most vital aspect for any regulatory authority if it is to be effective at protecting the investing public from accounting fraud, or rule violations falling short of fraud. In contrast to the self-regulatory system it replaces, many features of the PCAOB ensure the needed independence from the regulated industry. Through SEC oversight and other controls, however, the Board remains accountable to the investing public.

A. The PCAOB Is Carefully Designed to Have the Necessary Independence from the Regulated Industry.

A foundation of the PCAOB's industry independence is its status as an entity created by act of Congress. The Board's statutorily authorized role gives it legitimacy. The legislative origin of the PCAOB follows the reform recommendations of the POB, one of its predecessor bodies. In one of its final statements before terminating its existence, the POB called for legislative action to replace the system of which it had been a part, explaining that it was "essential that all critical elements of regulation—including all standard setting, inspections and reviews of accounting firms, enforcement and

discipline, and other functions—be placed under the aegis of a single regulator operating under statutory authority." POB Final Annual Report 2001, *supra*, at 51. Without that statutory authority, the PCAOB would be hampered by the same reliance on voluntary cooperation that undermined the accounting industry's self-regulatory scheme.

Another crucial element of the PCAOB's industry independence is the requirement that two—and only two—of its members be accountants. That structure ensures that the Board has the benefit of accounting professionals' expertise, see Framework, *supra*, at 44976, yet is not dominated by members of the profession. Aside from avoiding *de facto* control by the accounting industry, the non-accountant majority members bring to the Board creative perspectives less likely to come from the members steeped in the culture of the regulated industry. Cf. Weiss, Some Thoughts on an Agenda for the Public Company Accounting Oversight Board, 53 Duke L.J. 491, 497 (2003) ("[T]he PCAOB will need to think outside the box and promulgate auditing and ethical standards that address the very issues the accounting profession traditionally has chosen not to address.").

Finally, and perhaps most important to long-term independence from the industry it helps supervise, is a funding mechanism for the PCAOB that does not depend on the largesse of the regulated industry. Subject to SEC approval, which for accountability reasons is a matter of great consequence, the PCAOB is empowered to establish its own annual budget. 15 U.S.C. §7219(b). And it is empowered to fund that budget by collecting—again subject to all-important SEC approval—accounting support fees from issuers. 15 U.S.C. §§7219(c), (d). Removing the regulator's

purse strings from the hands of the regulated was vital to the Board's continued autonomy. See, *e.g.*, Cunningham, The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Just Might Work), 35 Conn. L. Rev. 915, 919 (2003) (in article generally critical of other aspects of Sarbanes-Oxley, acknowledging that replacement of the AICPA as regulator with the PCAOB "which is to be funded by public companies and led mostly by non-CPAs" is the Act's "principal silver bullet"). The dangers inherent in relying on a regulatory mechanism funded by the very industry being regulated—obvious enough in theory—were dramatically illustrated in practice by the industry's cut-off of funding to the POB in May 2000. The POB viewed that defunding as the industry's direct response to the POB's attempt to undertake a special review of the largest accounting firms after concerns about widespread auditor independence violations arose. POB Final Annual Report 2001, *supra*, at 48. The planned special reviews were stopped, and SEC Chairman Arthur Levitt noted that the funding cut-off was "a significant setback to self-regulation and independent oversight" that raised "serious questions as to the profession's commitment to self-regulation." *Ibid.* Experiences like the May 2000 defunding made clear that the PCAOB needed more financial insulation from industry caprice and self-interest if it was to be a more effective governing body than those it replaced.

B. The PCAOB Remains Accountable to the SEC and the Investing Public.

Just as vital as the PCAOB's independence from the industry it regulates is the PCAOB's accountability to the SEC and the investing public.

That counterbalance—a regulator not beholden to the regulated but accountable to the investors it is charged with protecting—was essential for real reform of the accounting profession. Indeed, the PCAOB, and Sarbanes-Oxley, of which it is a prominent part, were the outcome of a political process in which public shareowners and other stakeholders provided extensive input. Numerous witnesses testified in several days of public hearings before the Senate adopted Sarbanes-Oxley as its preferred solution. Additional hearings were held in the House on related reform legislation proceeding in that body. And, as the legislative history reveals, Congress had the benefit of voluminous reports detailing the troubled history of self-regulation and prescriptions for meaningful reform.

Ignoring the vast bulk of the Act's legislative history and extensive political input into the design of the Board, plaintiffs and their amici seize on an isolated soundbite from a single Senator, who, as a member of the Senate Committee on Banking, Housing, and Urban Development, was an outspoken critic of the bill. See Oppel, Corporate Conduct, N.Y. Times, July 25, 2002, at A1. Petitioners' and their amici's constant repetition of the phrase "massive . . . unchecked power by design," *e.g.*, Petitioners' Br. 2; Br. of *Amici Curiae* Law Professors in Support of Petitioners 18, does not make it so. The PCAOB's power is indeed carefully checked—by design—through its accountability to the SEC and, through that entity, to the Executive Branch and the investing public. See, *e.g.*, 15 U.S.C. §7217(a) ("The Commission shall have oversight and enforcement authority over the Board, as provided in this Act."). The PCAOB—although carefully designed to avoid encroachments on its authority through capture by

the regulated industry--is accountable to the SEC and the public it is charged with protecting. No amount of hyperbole by petitioners and their amici or repeated quotation of an isolated snippet by a PCAOB opponent can change this fact.

By design and in practice, the PCAOB exercises its regulatory authority over the accounting profession while itself under SEC supervision. The SEC, whose members are "appointed by the President by and with the advice and consent of the Senate," 15 U.S.C. §78d(a), appoints the members of the PCAOB "after consultation with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury." 15 U.S.C. §7211(e)(4)(A). The Board's budget and rules are subject to SEC approval. 15 U.S.C. §§ 7211(g), 7219(b). "In addition to appointing the PCAOB's members, the SEC has extensive oversight authority over the Board analogous to that exercised by the Commission over the [self-regulatory organizations]." Pritchard, *supra*, at 34. For example, the Commission may review any disciplinary action taken by the Board on its own motion or upon request, and it "may enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board upon a registered public accounting firm or associated person thereof." 15 U.S.C. §7217(c)(3). Through this structure the PCAOB, although an industry-independent body with sufficient flexibility and authority to address fundamental problems in the accounting industry, remains directly responsible to the SEC and ultimately subject to control by the Executive Branch, and, generally, accountable to the investing public. See, *e.g.*, Heminway, Rock, Paper, Scissors: Choosing the Right Vehicle for Federal Corporate

Governance Initiatives, 10 Fordham J. Corp. & Fin. L. 225, 319 (2005).

Congress's authority to vest regulatory power in independent agencies like the SEC is well established. See *Mistretta* v. *United States*, 488 U.S. 361, 412 (1989) (separation of powers not violated by Congress's establishment of the Federal Sentencing Commission as an independent agency in the judicial branch); *Wiener* v. *United States*, 357 U.S. 349, 355-356 (1958) (upholding implied congressional limitations on presidential power to remove members of the War Claims Commission); *Humphrey's Ex'r* v. *United States*, 295 U.S. 602, 631-632 (1935) (upholding provision limiting the President's power to remove members of the Federal Trade Commission to a showing of cause); cf. *Morrison* v. *Olson*, 487 U.S. 654, 670-697 (1988) (upholding constitutionality of the office of independent prosecutor). And, by longstanding practice, Congress has frequently endowed those agencies, including the SEC, with the power to appoint inferior officers who are necessary to an agency's fulfillment of its congressional mandate. See, *e.g.*, 47 U.S.C. §155(e) (Federal Communications Commission—managing director); 5 U.S.C. §4802(b) (SEC—"such officers . . . as may be necessary") (formerly codified at 15 U.S.C. §78d(b)); 15 U.S.C. §42 (Federal Trade Commission—secretary); 7 U.S.C. §2(a)(4) (Commodity Futures Trading Commission—general counsel). Petitioners do not question Congress's authority to locate regulation of the accounting industry in the SEC or, in broad fashion, the subordination of related duties to independent entities under the SEC's oversight. Cf. 15 U.S.C. §§77s(b)(1), 7219 (formalizing the SEC's reliance on an independent entity like the Financial Accounting Standards Board (FASB) to promulgate Generally

Accepted Accounting Principles). To the extent the PCAOB can be said to exercise governmental authority, it does so—by congressional design—only subject to the approval of the SEC. And the SEC's power to appoint the PCAOB members is entirely consistent with that independent agency's longstanding authority to appoint officers under its control. To the extent that Congress's declaration that "[t]he Board shall not be an agency or establishment of the United States Government," 15 U.S.C. §7211(b), must be respected, the SEC's reliance on the PCAOB to carry out particular oversight functions is no different than the SEC's long-established coordination with and supervision of entities like the FINRA (and one of its predecessor bodies, the NASD), NYSE, and other SROs and the FASB in the SEC's supervision of the securities markets. Indeed, the SEC exercises much greater control over the PCAOB than it has over any of those entities. For example, the FASB's members are appointed by the Financial Accounting Foundation, which also sets that board's budget, not the SEC or any other federal government entity. See Financial Accounting Foundation: Overview, http://www.fasb.org/faf/faf_info.shtml. In short, the PCAOB is no less accountable to the President and the public than the independent agency under whose auspices it operates.

The practical effect of the PCAOB's public accountability was illustrated early in the Board's existence when a public response compelled the resignation of its first chairman and the SEC chairman who sponsored him. See, *e.g.*, Spotlight on Sarbox, Corporate Financing Week, July 28, 2003, at 6. That event demonstrates the ability of the body politic to exert meaningful influence over the SEC

and PCAOB to curb even an appearance of impropriety that could shake investor confidence in the new regulating authority.

Additional controls provide further assurance that the PCAOB will remain an effective yet accountable body. The Board has been carefully designed with sufficient authority to fulfill its mission effectively while subject to sufficient checks to preserve the public's confidence that it is pursuing that mission with their interests at heart. The PCAOB is independent from the accounting industry it regulates and firmly under the control of the SEC.

The PCAOB's carefully crafted combination of industry independence and political accountability promises to benefit the investing public in a number of ways. The concentration of oversight functions that were previously fragmented across various divisions of the accounting industry itself should promote coherence and transparency in rulemaking, with an emphasis on rules that are more likely to protect the investing public.

Further, the Board's independence from the industry it is overseeing has resulted in more intensive inspections and more stringent enforcement. Such a shift provides an important boost for investor confidence in contrast to the old peer-review system that, as noted by observers like former Delaware Chancellor William Allen, many perceived as an "I scratched your back, you scratch my back organization." Framework, *supra*, at 44971, n. 63; Editorial, Watching the Watchers, Wash. Post, May 21, 2002, at A16. More rigorous and effective inspections along with more vigorous enforcement gives investors justified confidence not only that large-scale abuses will be caught and punished, but

also that many will be averted through earlier correction or prevention and deterrence.

C. The PCAOB's Rulemaking Authority Is Providing the Framework for Meaningful Reform.

The PCAOB's clearly delineated authority to establish auditing, attestation, quality control, and independence standards, subject to SEC approval, is providing the necessary structure around which a reformed American investment market is being built. In contrast to the patchwork, voluntary system it replaces, concentrating those governing functions in a single, authoritative body promises greater clarity for auditors and issuers regarding the rules under which they must operate and enhances the investing public's understanding of the rules that are followed in generating the statements on which those investors must rely. "As even critics concede, SOX helped restored [*sic*] investor confidence in the stock market, facilitating a rapid and dramatic recovery. This should be no surprise, for studies show that investors value increased transparency about a company's corporate governance, including the internal audit functions, when making investment decisions." Prentice, Sarbanes-Oxley: The Evidence Regarding the Impact of SOX 404, 29 Cardozo L. Rev. 703, 712-713 (2007). Empirical studies have demonstrated that, already by early 2007, the PCAOB's implementation of Sarbanes-Oxley's Section 404 had improved public companies' internal controls, with corresponding benefits to the capital markets' integrity and competitiveness. See, *e.g.*, Christopher Cox, SEC Chairman, Remarks to the U.S. Chamber of Commerce's First Annual Capital Markets Summit: Securing America's Competitiveness (Mar.

14, 2007), http://www.sec.gov/news/speech/2007/spch031407cc.htm; Rittenberg & Miller, Sarbanes-Oxley Section 404 Work: Looking at the Benefits 1-4, 19-21 (2005), http://www.theiia.org/research/research-reports/chronological-listing-research-reports/downloadable-research-reports/?i=248. Further, the PCAOB's open notice-and-comment rulemaking process, which is followed by notice-and-comment review by the SEC, gives investors a full and fair opportunity for input into the rules that are supposed to protect their interests—input they were denied when the accounting industry dominated the organizations that were supposed to be overseeing them.[4]

Fundamental to the PCAOB's mission is its power to set auditing standards (previously known as Generally Accepted Auditing Standards (GAAS)). "For generations, establishing GAAS had been the province of the AICPA. It has used various arms and structures to exercise this authority . . . . The total mix produced a situation that threatened the independence and objectivity of the entire process of promulgating GAAS and supervising the public auditing industry." Cunningham, *supra*, at 943. Shifting the authority to promulgate auditing standards from the accountants' own trade association to the PCAOB, an industry-independent body that is accountable directly to the SEC (and indirectly to the investing public) restores the fact and perception of

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[4] In contrast to the PCAOB, the board of the international auditing standard setter—a component of the International Federation of Accountants—has only one full-time member and no representatives from the investor community and is generally dominated by representatives of the accounting industry. See International Auditing and Assurance Standards Board, http://www.ifac.org/IAASB/About.php.

needed objectivity to the process. Both because the PCAOB starts its rulemaking process from a position of independence from the regulated industry and because that process invites participation by affected shareowners and other stakeholders, the outcome is likely to be standards that better protect investors' interest in the accuracy of financial statements.

Moreover, the confluence of rulemaking, inspection, and enforcement authority in the new body means that standards are more likely to evolve quickly and effectively to meet real-world needs. As former PCAOB Chairman William McDonough has explained, "for the first time, those developing auditing standards—[the PCAOB] Members and staff—will have access to robust empirical and anecdotal evidence from inspections and enforcement activities to set priorities and to identify needs to develop or amend standards." Oversight of the Public Company Accounting Oversight Board: Hearing Before the H. Subcomm. on Capital Markets, Insurance and Government Sponsored Enterprises of the Comm. on Financial Services, 108th Cong. 45 (2004) [hereinafter Oversight Hearing] (testimony of William J. McDonough, PCAOB chairman).

Some of petitioners' amici assert that the PCAOB's auditing standards are too burdensome and hurt American industry. See Br. of William P. Barr *et al.* 5; Br. of The Claremont Institute 31; Br. for the CATO Institute *et al.* 24-25. The Board's rules, however, are subject to notice-and-comment review before the SEC. 15 U.S.C. §§78s(b), 7217(b)-(c). The SEC receives the comments of public companies regarding burdens of compliance that reflect the same concerns amici raise, and it approves a rule

only if it independently determines that the rule is in the public interest.

The history of the PCAOB's Auditing Standard No. 5 illustrates the Board's responsiveness and effectiveness, and its coordination with the SEC. Auditing Standard No. 5 establishes a standard for the internal control audits required by SOX 404. Auditing Standard No. 5, PCAOB Release No. 2007-005A 1, 4 (June 12, 2007), http://www.pcaobus.org/Rules/Docket_021/2007-06-12_Release_No_2007-005A.pdf. Adopted by the PCAOB in June 2007 and approved by the SEC in July 2007, Auditing Standard No. 5 supersedes Auditing Standard No. 2, which had been adopted in 2004. *Id.*, at 1-2, 4. Standard 5 reflects the PCAOB's determinations—made following extensive information gathering; discussions with "representatives of issuers, auditors, investor groups, and others"; feedback from forum participants; review of reports and studies; and consultation with the SEC—that, although "the audit of internal control over financial reporting ha[d] produced significant benefits, . . . these benefits ha[d] come at a significant cost," especially for smaller companies. *Id.*, at 2.

The new auditing standard, promulgated after extensive public comment, *id.*, at 2-4, was intended to "make Section 404 audits and management evaluations more risk-based and scalable to company size and complexity," and thus "strengthened investor protection by refocusing resources on what truly matters to the integrity of financial statements." SEC Press Release, July 25, 2007, http://www.iasplus.com/usa/sec/0707as5secpr.pdf (quoting SEC Chairman Christopher Cox). "As one might imagine, one response to these SOX provisions

has been a greater emphasis by business leaders to the effectiveness of internal controls." Bucy & Joseph, Conducting Business in the Twenty-First Century, 70 Ala. Law. 184, 186 (2009); see also Wade, Sarbanes-Oxley Five Years Later, 39 Loy. U. Chi. L.J. 595, 607-611 (2008) (discussing Standard 5's role in shifting implementation of §404 from a "check-the-box" to a principles-based approach and concluding that "[e]mphasis on the admittedly broad principles of ethical compliance and monitoring, and the clearly articulated demand and expectation that managers behave ethically, will reduce risks and protect investors"). A recent PCAOB report indicates generally good compliance with Standard 5. Report on the First-Year Implementation of Auditing Standard No. 5, PCAOB Release No. 2009-006, http://www.pcaobus.org/Inspections/Other/2009/09-24_AS5_4010_Report.pdf; McCann, Most Auditors Ace Internal Control Tests, http://www.cfo.com/article.cfm/14442918/c_14443063?f=home_todayinfinance.

A recent survey demonstrates a high level of satisfaction with Sarbanes-Oxley and its implementation by the PCAOB and the SEC among investors. The Center for Audit Quality (CAQ), an autonomous group affiliated with the AICPA, conducted a nationwide survey of 1,000 investors in July 2007, in which 76% of investors said they felt that the PCAOB's oversight of auditing had had a positive effect. CAQ Research Summary 2, http://www.thecaq.org/events/sox/researchsummary.pdf. Nearly a third of the investors thought the PCAOB had had a "very positive" effect, while only 8% thought it had had a negative effect, with only 2% rating the PCAOB's effect "very negative." CAQ Survey Questionnaire 5, http://www.thecaq.org/

events/sox/surveyquestions.pdf. Additionally, investors answering the 2007 survey had positive views about Sarbanes-Oxley provisions generally.[5]

D. The PCAOB's Inspection and Enforcement Powers Are Making Reform a Reality for Investors.

The best rules in the world do investors no good unless put into practice. Again drawing on the lessons from the history of the voluntary self-regulatory regime, Congress endowed the PCAOB with the necessary and appropriate enforcement tools to fulfill its mission to the investing public. See 15 U.S.C. §§7214, 7215; cf. Manns, Rating Risk After the Subprime Mortgage Crisis, 87 N.C. L. Rev. 1011, 1057 & n.196 (2009) (contrasting the SEC's "nominal oversight" of rating agencies under the Credit Rating Agency Reform Act of 2006 with the PCAOB's oversight of auditing). Those tools include the registration requirement, inspection authority, investigatory powers, and recourse to significant sanctions. All of these tools are subject generally to SEC oversight.

"Registration of public accounting firms that audit public companies is the foundation of the Board's authority. Since October 22, 2003, it has been illegal for any U.S. public accounting firm to prepare, issue, or play a substantial role in the

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[5] A 2008 CAQ survey indicated declining confidence in U.S. capital markets, but economic factors were the top reasons given for that decline. Report on the Center for Audit Quality's Second Annual Survey of Investors, July 2008, at 7, http://www.thecaq.org/newsroom/pdfs/july2008investorsurvey.pdf. The 2008 survey did not include questions about the PCAOB or Sarbanes-Oxley.

preparation or issuance of, an audit report on the financial statements of a U.S. public company unless it is registered with the Board." Oversight Hearing, *supra*, at 38 (testimony of William J. McDonough, Chairman, Public Company Accounting Oversight Board). The SEC now also requires registration by auditors of non-public broker-dealers, Board Statement on the PCAOB Registration Process For Auditors of Non-Public Broker-Dealers, http://www.pcaobus.org/News_and_Events/News/2009/01-07.aspx, and proposed legislation could give the PCAOB additional authority over such registered firms, all of which may better protect investors from Ponzi schemes like the Madoff fraud involving non-registered auditors. See Stevelman, Globalization and Corporate Social Responsibility, 53 N.Y.L. Sch. L. Rev. 817, 832-833, 845 (2008/2009).

Registered firms are subject to inspection by the PCAOB, under rules that must be approved, and can be modified, by the SEC. 15 U.S.C. §7214(a). Large firms—those that audit more than 100 public companies—are inspected at least annually; smaller firms at least once every three years. 15 U.S.C. §7214(b). The Board may conduct special inspections as needed, either at the request of the SEC or on its own motion. *Ibid.* In addition to being more frequent than inspections under the former peer review system, the PCAOB inspections dig deeper and produce more meaningful results. Oversight Hearing, *supra*, at 41-42 (testimony of William J. McDonough, Chairman, Public Company Accounting Oversight Board). The PCAOB's inspections go beyond reviewing auditors for technical compliance, delving into the broader business context of audit practices and influences on those practices. *Ibid.*; see 15 U.S.C. §7214(d)(2); cf. Weiss, *supra*, at 501-502

(advising the PCAOB to consider "principal-agent tensions that exist within" each accounting firm and "abandon[] the notion—now implicit in the accounting profession's ethical standards and rules on independence—that it is appropriate to view each accounting firm as a 'black box' that can and should be regulated as an entity"). The increased regularity and rigor of inspections will greatly improve the odds of detecting violations of auditing standards or auditor-independence rules and of excising minor problems before they metastasize into major ones.

Further adding to the PCAOB's ability to detect and correct violations in a timely manner is the lifting of any restraint on inspection of audit engagements that are the subject of litigation or other ongoing controversy. See 15 U.S.C. §7214(d). Under the peer review regime, reviews of such engagements were delayed—if they took place at all—until after a litigation or other dispute was resolved. See Daniel L. Goelzer, PCAOB Board Member, Remarks: Lessons from Enron, The Importance of Proper Accounting Oversight (July 27, 2006). Under that system, years could pass from the time a violation was committed to when it was caught and punished, if at all. Clearly the PCAOB's new flexibility to review engagements even while a lawsuit or controversy is pending provides for more swift and certain correction of violations, furthering the interest of investors in removing the financial reporting process from the hands of incompetent or unethical auditors.

In addition to its inspection duties, the PCAOB has tools to investigate and discipline violations, again subject to control and review by the SEC. The Board may, subject to SEC oversight, promulgate

rules requiring cooperation with requests for document or testimony production and may request the SEC to subpoena witnesses and documents. 15 U.S.C. §7215(b)(1)-(2). The Board must coordinate investigations involving potential violations of securities laws with the SEC, and may—subject to SEC review—discipline individuals or firms who refuse to cooperate with its investigations. 15 U.S.C. §7215(b)(3)-(4).

As described above, the POB's frustrated attempt to conduct effective independence reviews in 2000 illustrates why an effective oversight body needs the inspection authority like that granted in 15 U.S.C. §7214, investigatory and enforcement tools like those in 15 U.S.C. §7215, and financial independence from the accounting industry. Because of the Board's funding independence, duty to conduct regular inspections, and ability to undertake necessary investigations, investors can be assured that the PCAOB will not be hampered in its enforcement efforts by the structural obstacles that prevented the POB from pursuing effective independence reviews.

Critically also, the Act imposes an enforcement regime with teeth. Unlike the AICPA self-regulatory structure it replaced, the PCAOB is empowered to impose meaningful, proportionate sanctions on violators. Cf., *e.g.*, Editorial, Watching the Watchers, Wash. Post, May 21, 2002, at A16 ("[T]he [POB] was a peerless paper tiger, and no major auditor was ever sanctioned as a result of its reviews."). "The PCAOB has signaled an intention to be tough-minded in enforcing its mandate [to] scrutinize auditors." Brodsky, Updates on the Corporate Attorney-Client Privilege, 8 Sedona Conf. J. 89, 99 (2007). The PCAOB has already undertaken several enforcement

actions, including, for example, in December 2007, fining firm Deloitte & Touche $1 million for knowingly permitting an incompetent auditor to handle the engagement for Ligand Pharmaceuticals. *In re Deloitte & Touche LLP*, Order, PCAOB Release No. 105-2007-005 (Dec. 10, 2007), http://www.pcaobus.org/enforcement/disciplinary_proceedings/2007/12-10_deloitte.pdf; see also Disciplinary Proceedings, http://www.pcaobus.org/enforcement/disciplinary_proceedings/index.aspx.

But those enforcement powers are all exercised subject to SEC review. 15 U.S.C. §7217. In its 2002 Framework report, the SEC identified ineffective discipline as "[a] primary criticism" of the old, voluntary self-regulatory system, noting that "[t]he strongest sanction issued by the AICPA is expulsion from that organization, which does not remove the individual or firm from practice before the Commission." Framework, *supra*, at 44964. The PCAOB, by contrast, has the discretion, subject to SEC review, to choose from a broad array of sanctions for a rule violation, ranging from censure or requiring professional education through permanent disbarment or civil monetary penalties of up to $750,000 for an individual or $15 million for a firm for intentional, knowing, or reckless misconduct. 15 U.S.C. §7215(c)(4). The Board must notify the SEC of any final sanction imposed, and "[t]he Commission may enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board." 15 U.S.C. §7217(c)(3). Thus, once again, Congress has provided the PCAOB with the tools to do its regulatory job and the agency oversight to ensure the Board's public accountability.

III. THE COURT SHOULD PRESERVE THE PCAOB EVEN IF THE REMOVAL RESTRICTIONS ARE DEEMED IMPERMISSIBLE.

Amici disagree with petitioners' assertion that Sarbanes-Oxley's provisions regarding the SEC's power to remove PCAOB members from office, see SOX §107(d)(3), 15 U.S.C. §7271(d)(3); SOX §101(e)(6), 15 U.S.C. §7211(e)(6), violate the Constitution. But if the Court finds the removal provisions invalid, it should limit its holding to excising the invalid portions and, in accordance with congressional intent, preserve the PCAOB as a vital protector of the investing public.

"Generally speaking, when confronting a constitutional flaw in a statute, [the Court] tr[ies] to limit the solution to the problem," preferring "to sever its problematic portions while leaving the remainder intact." *Ayotte* v. *Planned Parenthood*, 546 U.S. 320, 328-329 (2006). If the limitations on the SEC's removal power are constitutionally flawed, any problem is easily solved by either (1) leaving the SEC with generic for-cause removal authority by striking "remove from office or" from §107(d)(3) and "in accordance with section 107(d)(3)" from §101(e)(6) or (2) leaving the SEC with at-will removal authority by, for example, striking "remove from office or" from §107(d)(3) and "in accordance with section 107(d)(3), for good cause shown before the expiration date of the term of that member" from §101(e)(6) or by striking §§107(d)(3) and 101(e)(6) in their entirety.[6] Such

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[6] A statute that is silent as to removal is presumed to invest the appointing authority with at-will removal power. *Shurtleff* v. *United States*, 189 U.S. 311, 316-318 (1903); *Ex parte Hennen*, 13 Pet. 225, 258-260 (1839).

a solution would serve the "[t]hree interrelated principles" explained in *Ayotte*: (1) it would nullify only as much of Congress's work as necessary, respecting the intent of the people's elected representatives; (2) it would strike the constitutionally problematic portions without rewriting the entire statute; and (3) it would recognize that Congress would "have preferred what is left of its statute to no statute at all." 546 U.S., at 330.

Even when a statute contains no severability clause, "the presumption is in favor of severability." *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984); accord *New York* v. *United States*, 505 U.S. 144, 186 (1992). In *Myers* v. *United States*, the Court retained the bulk of a statute dividing postmasters into classes and granting certain powers to the Postmaster General while severing an invalid provision constraining the President's power of removal of certain postmasters. 272 U.S. 52, 176 (1926).

Severability "is largely a question of legislative intent." *Regan*, 468 U.S., at 653. In contrast to the Gramm-Rudman-Hollings Act considered in *Bowsher* v. *Synar*, 478 U.S. 714, 735 (1986), the legislative history of Sarbanes-Oxley demonstrates that Congress would have created the PCAOB even without the provisions that restrict the SEC's removal of Board members. Congress's primary purpose in creating the PCAOB was to establish a regulatory framework that was independent of *the accounting profession*, and thus protect investors. See, *e.g.*, S. Rep. No. 107-205, at 2 (2002); Pub. L. No. 107-204, 116 Stat. 745, 745; 148 Cong. Rec. S7351 (daily ed. July 25, 2002) (statement of Sen. Sarbanes); 148 Cong. Rec. S6330

(daily ed. July 8, 2002) (statement of Sen. Sarbanes).[7] Indeed, Congress considered vesting the functions of the PCAOB in the SEC and rejected that idea primarily because of concern that the SEC lacked adequate resources, not because Congress preferred to insulate the PCAOB's functions from the Executive Branch. See, *e.g.*, Senate Hearings, at 36-38, 219, 704-709, 1087-1088, 1091; House Hearings, at 157-158, 223; 148 Cong. Reg. H1548 (daily ed. April 24, 2002); 148 Cong. Reg. H4479 (daily ed. July 10, 2002); 148 Cong. Rec. S6761 (daily ed. July 15, 2002).

In creating the Board, Congress sought not to make the PCAOB independent of the SEC but, rather, by *enhancing* SEC oversight of the PCAOB, ensuring the Board's independence from the accounting profession. See, *e.g.*, S. Rep. No. 107-205, at 12. Nothing in the legislative history suggests

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[7] See also, *e.g.*, Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs, The Legislative History of the Sarbanes-Oxley Act of 2002: Accounting Reform and Investor Protection Issues Raised by Enron and Other Public Companies, 107th Cong. 897-898 (2002) (statement of Charles Bowsher, POB chairman) [hereinafter Senate Hearings]; *id.*, at 15-16 (statement of Arthur Levitt, former SEC chairman); *id.*, at 24 (statement of Lynn Turner, former SEC chief accountant); *id.*, at 106 (testimony of Paul Volcker, former SEC chairman); *id.*, at 661 (letter from Comptroller General David Walker to Sen. Sarbanes); 148 Cong. Rec. S6330 (daily ed. July 8, 2002) (statement of Sen. Sarbanes); 148 Cong. Rec. S6758 (daily ed. July 15, 2002) (statement of Sen. Kohl); H.R. 3763, The Corporate and Auditing Accountability, Responsibility and Transparency Act of 2002, Hearings Before the H. Comm. on Financial Services, 107th Cong. 22 (2002) (statement of Rep. Sanders) [hereinafter House Hearings]; *id.*, at 200 (statement of Barry Melancon, AICPA president and CEO); *id.*, at 50 (statement of Barbara Roper, Consumer Federation of America); S. Rep. 107-205, at 6; H.R. Rep. No. 107-414, at 18.

that Congress intended to limit the Executive Branch's authority over the PCAOB. The removal power was never a focus of debate. In thousands of pages of the Act's legislative history, it is mentioned only briefly by two witnesses—one emphasizing the SEC's for-cause removal power as a means of SEC *control*, the other addressing a very different proposal from that Congress enacted. Senate Hearings, at 584, 899, 942.

Because the statutory structure and legislative record confirm that Congress would have preferred the creation of the PCAOB without the removal restrictions to no PCAOB at all, if the Court finds the removal provisions unconstitutional, it should sever those provisions and leave the remainder intact. Preserving the PCAOB fulfills the intent of the people's elected representatives to enhance investor protection.

CONCLUSION

For the reasons detailed above, amici urge the Court to recognize the enormous importance that the success of the PCAOB has for the investing public. Acting within the constitutional framework, Congress has carefully designed a body with the necessary industry independence, accountability, and authority to restore the public's trust in auditing and its confidence in the financial reports of public companies. In the interest of protecting investors, the PCAOB should be permitted to continue doing the job Congress has charged it with doing.

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AMICUS CURIAE BRIEF

No. 08-861

IN THE

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FREE ENTERPRISE FUND
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Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INTEREST OF AMICI CURIAE[1]

Amici curiae are seven former Chairmen of the SEC, who reflect four decades of SEC leadership under Presidents of both political parties: G. Bradford Cook (1973), Roderick M. Hills (1975-1977), Harold M. Williams (1977-1981), David S. Ruder (1987-1989), Arthur Levitt, Jr. (1993-2001), Harvey L. Pitt (2001-2003), and William Donaldson (2003-2005). Former Chairmen Hills and Ruder served on the Advisory Council to the PCAOB from 2004 to 2009 and now serve as emeritus members. Collectively, amici represent decades of experience in the administration of the federal securities laws. Five (Chairmen Hills, Williams, Ruder, Levitt, and Pitt) testified during hearings that led to the adoption of the Sarbanes-Oxley Act of 2002, and Congress cited their testimony frequently to support and explain the Act's structure. Two (Chairmen Pitt and Donaldson) were directly responsible for the Act's initial implementation, including creating and staffing the PCAOB. Amici filed briefs before the District Court and Court of Appeals to support the United States' defense of the Act.

The former Chairmen address two areas in which they believe their experience and expertise can provide important context to the constitutional issues before the Court: (1) the significance of the SEC-Board relationship within the overall regime of financial regula-

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), written consents to the filing of this brief have been placed on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici or their counsel, made a monetary contribution to the preparation or submission of this brief.

tion, and (2) the extent to which the SEC has actively overseen, supervised, and directed the Board's activities in the more than seven years since the Act's adoption. Given the importance of the Act and the SEC-PCAOB structure to the integrity of U.S. capital markets, the former SEC Chairmen respectfully submit this brief.

SUMMARY OF ARGUMENT

Congress designed the PCAOB to be wholly independent of the accounting profession, but under the complete oversight and control of the SEC. As advised by experienced financial regulators and other experts, Congress built on the unique system of public-private regulatory partnerships that have characterized financial regulation in the United States for seven decades. Since the 1930s, the SEC has exercised power over an integrated regulatory system that includes private-sector, self-regulatory organizations (SROs), such as the New York Stock Exchange (NYSE) and Nasdaq Stock Exchange, the National Association of Securities Dealers (NASD, now the Financial Industry Regulatory Authority, (FINRA)), and the Municipal Securities Rulemaking Board. The SEC-PCAOB structure was a logical outgrowth of this longstanding SRO system. But Congress gave the SEC even more pervasive powers over the Board than it has over the SROs, precisely in order to ensure the unified, coherent administration of financial regulation that is possible only through comprehensive SEC control.

Moreover, the SEC's complete power over the Board is not just a matter of legal authority, but of fact. In the seven years since Sarbanes-Oxley was enacted, the SEC has used its arsenal of powers vigorously and continuously to ensure that PCAOB rules and practices

conform to SEC policies. The SEC's authority has spawned close, ongoing coordination between the two bodies. The pervasive powers Congress gave the SEC thus have translated in practice into comprehensive SEC control and oversight of the Board's actions.

Viewed in this proper context, petitioners' constitutional challenges to the PCAOB should be rejected. Whatever the nature of its authority to remove PCAOB members, the SEC's comprehensive power over the Board, in law as well as fact, enables the SEC to direct the Board's every action and effectively to preclude any Board member from defying the Commission's policy choices. Contrary to the rhetoric of the Board's opponents, this case presents no question of "an independent agency inside an independent agency," or of "*Humphrey's Executor* squared." The Board is not an independent agency. Congress designed the Board to be independent of the accounting profession, but completely subordinate to the SEC—and that objective has been realized in practice. As long as the SEC itself is constitutional, the SEC-Board structure is constitutional.

ARGUMENT

I. THE SEC-PCAOB STRUCTURE WAS DESIGNED TO MAKE REGULATION INDEPENDENT OF THE ACCOUNTING PROFESSION BUT SUBJECT TO PLENARY SEC CONTROL

Based on testimony and information from experienced regulators, Congress designed the SEC-Board structure with several aims: to ensure the Board's independence from the accounting profession; to ensure efficient and coherent financial regulation by putting the Board under the plenary authority of the SEC; to ensure competent and sophisticated supervision of the

accounting profession by enabling the Board to pay salaries competitive with the private sector; to ensure sustained focus and commitment to the Board's mission by giving it a dedicated and independent source of funding; and to ensure fair, impartial administration by limiting potential congressional interference with the Board.

In pursuing those objectives, Congress did not draft on a blank slate. The Board's design was a logical outgrowth of decades of public-private regulatory partnerships that uniquely characterize regulation of the financial markets. The industry's SROs—private, quasi-governmental bodies responsible for standard-setting and discipline, subject to SEC plenary control—provided the regulatory framework within which Congress designed the PCAOB. Congress built upon decades of experience with these structures in an effort to maintain the distinct advantages that flow from the SROs' public-private nature while providing needed independence from the regulated profession. To the extent Sarbanes-Oxley departs from the SRO experience, it consistently does so to *increase* the SEC's control over the Board even beyond that which the SEC has over the pre-existing SROs.

A. Congress Designed The PCAOB Within The System Of Public-Private Regulatory Structures That Have Uniquely Characterized Financial-Market Regulation Since The 1930s

Since its creation in the wake of the 1929 market crash, the SEC has regulated the U.S. capital markets through a unique "partnership between government and private enterprise." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 366 (1963); *see also Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 663-667

(1975). A central pillar of this unique regulatory regime has long been the principle of industry self-regulation, under which "the industry regulates itself through various self-regulatory organizations ... overseen by the SEC." *Accounting Reform and Investor Protection: Hearings Before the S. Comm. on Banking, Hous., and Urban Affairs*, 107th Cong. 552 (2002) ("*Accounting Reform Hearings*") (statement of Comptroller General David M. Walker). SROs include securities exchanges such as the NYSE, as well as the NASD (now FINRA), which regulates the over-the-counter securities market. *Id.* As the Commission observed decades ago:

> There are, no doubt, many other instances in which the policy of entrusting a degree of social control to "private" groups has been adopted, but securities regulation is unique in featuring self-regulation as an essential and officially sanctioned part of the regulatory pattern.

SEC, Report of Special Study of Securities Markets of the Securities and Exchange Commission, H.R. Doc. No. 88-95, pt. 4, at 501 (1963).

Self-regulatory organizations long predated the creation of the SEC—the NYSE, for example, was formed in 1792—and "have enjoyed congressionally delegated quasi-governmental powers to discipline their members for nearly 70 years." *National Ass'n of Secs. Dealers, Inc.* v. *SEC*, 431 F.3d 803, 807 (D.C. Cir. 2005) ("*NASD*"). In the federal securities laws, beginning with the Securities Exchange Act of 1934 ("Exchange Act"), Congress "'delegated government power' to SROs ... 'to enforce ... compliance by members of the industry with both the legal requirements laid down in the Exchange Act and ethical standards going

beyond those requirements.'" *Credit Suisse First Boston Corp.* v. *Grunwald*, 400 F.3d 1119, 1128 (9th Cir. 2005) (quoting S. Rep. No. 94-75, at 23 (1975)) (second alteration in original). SROs' wide-ranging responsibilities include rulemaking, examining members for compliance with those rules, and taking disciplinary action against members that fail to comply, as well as professional activities such as testing, training, and licensing, dispute resolution, investor education, and market monitoring. *See, e.g.*, *Accounting Reform Hearings*, at 570 (statement of NASD Chairman Robert Glauber).

SROs, though private entities, act pursuant to SEC oversight, *see Gordon*, 422 U.S. at 667, and have "no authority to regulate independently of the SEC's control," S. Rep. No. 94-75, at 23; *see also* 15 U.S.C. § 78s (delineating SEC oversight of SROs). SROs must obtain the Commission's approval to enact or amend any rule, *id.* § 78s(b), and the Commission may amend or abrogate the rules of any SRO, *id.* § 78s(c). The Commission also "closely supervises and approves" SRO disciplinary processes and may "fully revisit[] the issue of liability, and can completely reject or modify" SRO disciplinary decisions. *NASD*, 431 F.3d at 806; *see also* 15 U.S.C. § 78s(d), (e); *Schultz* v. *SEC*, 614 F.2d 561, 568 (7th Cir. 1980). Thus, the legal authority of the SROs "ultimately belongs to the SEC." *NASD*, 431 F.3d at 806.

In light of the SEC's numerous powers of control and oversight, the SEC has long been understood to have plenary power over the SROs. *See, e.g.*, *NASD*, 431 F.3d at 806-808; *Credit Suisse*, 400 F.3d at 1130. Indicative of that authority, the SEC's broad authority to approve or disapprove SRO rules and other actions may immunize regulated SRO practices from antitrust liability. *See Gordon*, 422 U.S. 659 (immunity for fixed

commission rates); *United States* v. *National Ass'n of Secs. Dealers, Inc.*, 422 U.S. 694 (1975) (immunity for securities dealers' pricing practices in secondary mutual funds markets). Similarly, the Commission's role in reviewing and approving SRO rules means that such rules may preempt conflicting state law. *See, e.g.*, *Credit Suisse*, 400 F.3d at 1128, 1132. Regulation of the financial markets has thus long entailed a unique set of public-private regulatory partnerships, with the SEC at the top of this system to ensure its overall effectiveness, efficiency, and coherence.

B. By The Time Of Sarbanes-Oxley, Auditing Oversight Had Become Compromised By Dependence On The Accounting Profession

Before Sarbanes-Oxley, the principle of self-regulation similarly shaped SEC regulation of financial reporting and auditing. The Commission looked to the private sector, in the first instance, to establish Generally Accepted Accounting Principles and to set ethical standards. *See Accounting Reform Hearings*, at 552 (statement of Comptroller General Walker). Regulation of the accounting profession occurred largely under the auspices of the American Institute of Certified Public Accountants (AICPA), the profession's trade association, which set professional standards. Accounting standards were first set inside AICPA, then, when that proved inadequate, by an outside body, the Financial Accounting Standards Board (FASB). Though reserving the right to object, the SEC generally deferred to FASB's standards. *See* SEC, Statement of Policy on Establishment and Improvement of Accounting Principles and Standards, 39 Fed. Reg. 1260 (Jan. 7, 1974); *Accounting Reform Hearings*, at 552 (statement of Comptroller General Walker).

Financial scandals in the mid-1970s led the AICPA and SEC to create the Public Oversight Board (POB), a private-sector body charged with conducting quality assurance reviews of public accounting firms, particularly in connection with their auditing activities. *See Accounting Reform Hearings*, at 552 (statement of Comptroller General Walker); *see also id.* at 555-557. Despite efforts to imbue the POB with independence, the POB's financing depended on AICPA and the major accounting firms; ultimately their ability to threaten or actually withhold funding from the POB made it clear—even before the collapse of Enron—that self-regulation of auditing was inadequate. By 1999, the SEC reported to Congress that it no longer considered the POB system effective. *See* SEC Annual Report 1999, at 92; *see also Accounting Reform Hearings*, at 246-247 (testimony of former SEC Chief Accountant Lynn Turner).

In numerous hearings leading up to enactment of Sarbanes-Oxley, Congress heard extensive testimony on the existing system's failure to prevent financial misstatements and fraud.[2] Harvey Pitt, the sitting Chairman of the SEC, and five former Chairmen, along with other experts, detailed weaknesses of the existing self-regulatory regime and advocated creation of a new auditing oversight board. *See, e.g., Accounting Reform*

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[2] Contrary to petitioners' amici's characterization (*see, e.g.*, Cato Br. 1, 3-4, 6), Sarbanes-Oxley was the product of extensive deliberation. From late-2000 to mid-2001, Congress held dozens of hearings, considered over 30 versions of proposed legislation, and heard testimony from representatives of government, industry, academia, and consumer groups. *See* Nagy, *Playing Peekaboo With Constitutional Law: The PCAOB and its Public/Private Status*, 80 Notre Dame L. Rev. 975, 996-997 (2004-2005); *see also, e.g., Accounting Reform Hearings*, at iii-ix.

Hearings, at 21-22, 71-72 (testimony and statement of former SEC Chairman David S. Ruder); *see also id.* at 23 (testimony of former SEC Chairman Harold M. Williams). Charles Bowsher, then chairman of the POB and previously U.S. Comptroller General, testified "that the voluntary, self-regulatory program needs to be replaced because it has failed to keep pace with the challenges faced by the profession." *Id.* at 897. And Paul Volcker, former Chairman of the Federal Reserve System, concluded that oversight of auditing by the accounting profession had proved "very unsatisfactory." *Id.* at 106.

The consensus view of witnesses and members of Congress was that these failings were due to the accounting profession's capture and domination of the private-sector regulatory regime. As Senator Kohl concluded, "the current system of self-regulation ... has been the root of many of the frauds being revealed today." 148 Cong. Rec. S6757, S6758 (daily ed. July 15, 2002).[3] Congress was thus advised repeatedly to create a "truly independent" overseer that would not be hostage to those being regulated. *Accounting Reform Hearings*, at 21-22 (testimony of former SEC Chairman Ruder); *see also id.* at 24-25 (testimony of former SEC Chairman Williams); *id.* at 898 (testimony of POB Chairman Bowsher) ("to be effective," oversight "must be totally independent of the accounting profession").[4]

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[3] *See also* 148 Cong. Rec. S6327, S6330 (daily ed. July 8, 2002) (statement of Sen. Sarbanes); *Accounting Reform Hearings*, at 71-72 (statement of former SEC Chairman Ruder); *id.* at 897 (testimony of POB Chairman Bowsher).

[4] *See also H.R. 3763, The Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002: Hearings*

Part of the problem was that entities like the POB relied on peer review to oversee auditing practices. As former SEC Chairman Roderick M. Hills testified, "the almost universal view is that peer review of accounting firms is not providing sufficient quality control." *H.R. 3763, The Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002: Hearings Before the H. Comm. on Fin. Servs.*, 107th Cong. 257 ("*CAARTA Hearings*"). Chairman Pitt agreed that "the current system of peer review is not working. You have firm-on-firm review. It doesn't provide the kind of discipline that we need." *The Enron Collapse: Implications to Investors and the Capital Markets, Part 2: Hearings Before the Subcomm. on Capital Markets, Insurance, and Gov't Sponsored Enterprises of the H. Comm. on Fin. Servs.*, 107th Cong. 48 (2002) ("*Enron Collapse Hearings*"). Former SEC Chairman Harold Williams, during whose chairmanship the POB had been created, agreed that "events over the intervening years have demonstrated that [the POB] does not meet the needs and is not adequate." *Accounting Reform Hearings*, at 24-25. He reported that, "as the Big 8 has become the Big 5," peer review had become "too incestuous"; since the POB's creation in 1977, no firm had ever given another firm a negative review. *Id.*

In addition, experts testified that the POB was compromised by its dependence on the accounting profession for funding. Without adequate dedicated funding, the POB was "beholden for its funding to the very

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Before the H. Comm. on Fin. Servs., 107th Cong. 200 (statement of Barry Melancon, AICPA President and CEO) (advocating "a robust private sector regulatory body, independent of the accounting profession"); *id.* at 50 (testimony of Barbara Roper, Director of Investor Protection, Consumer Federation of America) (same).

people it [was] supposed to oversee." *Accounting Reform Hearings*, at 24-25 (testimony of former SEC Chairman Williams). Congress learned, for example, that the industry had decided to cut off funding for reviews of the major accounting firms that POB was conducting at the Commission's request. *Id.* at 897 (testimony of POB Chairman Bowsher).

Apart from the need for a body independent of the accounting profession, Congress heard testimony that this new entity must be subject to complete SEC control. Thus, SEC Chairman Pitt advised that:

> Critical regulatory functions, including quality control and discipline, should be moved from the profession to an independent regulatory body that is completely or substantially free from influence or funding by the profession, and is subject to comprehensive and vigorous SEC oversight.

CAARTA Hearings, at 307; *see also Accounting Reform Hearings*, at 1106. Indeed, the SEC had already proposed the creation of a new private-sector regulatory body, *CAARTA Hearings*, at 71, 82, 309-310 (testimony of then-Chairman Pitt), that would be structured to provide needed independence from industry and be subject to the Commission's "rigorous oversight," *Enron Collapse Hearings*, at 30 (testimony of then-Chairman Pitt); *see also id.* at 48 (testimony of then-Chairman Pitt) (describing SEC proposal); 67 Fed. Reg. 44,964 (July 5, 2002) (notice of proposed rulemaking).

C. Congress Designed The Board To Be Independent Of The Accounting Profession But Subject To Pervasive SEC Control

In light of these concerns, Congress designed the new oversight board with the overriding goal of ensuring its independence from the accounting profession. As Senator Sarbanes explained, the failing of self-regulation in the accounting area was "obviously one of the reasons we are moving, in this legislation, to an independent public company accounting oversight board." 148 Cong. Rec. at S6330. Senator Levin agreed that designing the oversight board to be "free of domination by either accounting or corporate interests" and liberating the standard-setting process from the "direct control of the accounting industry" was "one of the most important changes" the new legislation would make. 148 Cong. Rec. S6561, S6566 (daily ed. July 10, 2002).[5]

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[5] *See also* 148 Cong. Rec. S7350, S7351 (daily ed. July 25, 2002) (statement of Sen. Sarbanes) ("This legislation establishes a strong independent accounting oversight board, thereby bringing to an end the system of self-regulation in the accounting profession which, regrettably, has not only failed to protect investors ... but which has in effect abused the confidence in the markets[.]"); 148 Cong. Rec. H5462, H5462-5463 (daily ed. July 25, 2002) (statement of Rep. LaFalce) ("[T]he oversight board included in the final conference report will be independently funded and will have strong disciplinary, investigatory, and most importantly, standard-setting powers.... No longer will the accounting industry be able to set the rules for itself without regard for the interests of shareholders."); 148 Cong. Rec. at S7355 (statement of Sen. Enzi) ("This legislation builds a strong and independent board to oversee the accounting industry. It will eliminate the climate of self-regulation that has historically guided accounting."); 148 Cong. Rec. E1452, E1452 (daily ed. July 29, 2002) (statement of Rep. Markey) ("Cor-

To achieve these objectives, Congress borrowed from the financial system's existing regulatory institutions and long tradition of public-private partnership, while adding even greater safeguards to make the new board more independent from the accounting profession than existing SROs were with respect to the elements of the securities industry they oversaw. *See, e.g.*, *Accounting Reform Hearings*, at 1091-1092 (colloquy between Sen. Sarbanes and then-Chairman Pitt) (discussing NASD and NYSE as models); *id.* at 1099-1100; *id.* at 21 (testimony of former SEC Chairman Ruder) (urging the creation of a "new, separate audit supervisory board ... modeled on the private sector [FASB] and perhaps on the self-regulatory system of the NASD"); *id.* at 527-530, 571-573 (testimony of NASD Chairman Robert R. Glauber) (suggesting new private-sector regulator modeled on NASD).[6]

Thus, like existing SROs, the new board would have authority to propose rules and standards, examine firms for compliance, assess quality controls at all accounting firms that audit public companies, and propose sanctions for noncompliance. To ensure the Board's in-

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porate auditors will no longer be policing themselves, but instead will be subject to an independent accounting oversight board.").

[6] The PCAOB's statutory designation as a private, nonprofit corporation, *see* 15 U.S.C. § 7211(a), (b), thus reflects the Board's roots in the SRO tradition. SROs were private-sector organizations, and many experts urged Congress to borrow from that model in order to achieve the comparative resource, staffing, and infrastructure advantages that private organizations enjoyed over government entities. *See Accounting Reform Hearings*, at 532-533, 579 (testimony and statement of Prof. Joel Seligman); *id.* at 583-584 (statement of Prof. John C. Coffee, Jr.); *id.* at 527-530, 571-573 (testimony and statement of NASD Chairman Glauber).

dependence, Congress accepted the recommendations of experienced regulators that the Board have a guaranteed source of funding not dependent on voluntary professional contributions. *See* 15 U.S.C. § 7219. Instead, Congress adopted an industry-funded dedicated fee structure similar to those long used in other contexts. *See* PCAOB Br. 19 n.3; U.S. Br. 35-36. As former SEC Chairman Hills put it, the new overseer "should not need to 'pass the hat.'" *CAARTA Hearings*, at 264. Congress also recognized that dedicated funding would allow the Board to compensate employees at competitive levels high enough to attract a "strong, well-trained, and experienced staff, of sufficient size to carry out [the Board's] responsibilities." S. Rep. No. 107-205, at 7 (2002); *see also Accounting Reform Hearings*, at 937; *id.* at 209, 246 (testimony and statement of former SEC Chief Accountant Turner); *id.* at 1036 (statement of Sen. (Ret.) Metzenbaum).

Congress similarly adopted other structural features to enhance the Board's independence from the accounting profession. For example, then-SEC Chairman Pitt and former Chairman Ruder had advocated "a regulatory body in which all of the members are not connected with the accounting profession." *Accounting Reform Hearings*, at 37 (testimony of former SEC Chairman Ruder); *see also Enron Collapse Hearings*, at 30 (testimony of then-Chairman Pitt). Congress accordingly imposed strict limits on Board member ties to industry. *See* 15 U.S.C. § 7211(e)(2), (3).

While ensuring the Board's independence, Congress also built on the SEC's relationship with the SROs to guarantee that the Board would function under the SEC's full authority and comprehensive control. Thus, many statutory oversight rules governing SROs generally were applied to the PCAOB in Sar-

banes-Oxley. *Compare, e.g.*, 15 U.S.C. §§ 78q(b)(1), 78s(c), *with id.* §§ 7217(a), 7217(b)(5); *see also* S. Rep. No. 107-205, at 12 ("The rules for SEC oversight of the Board are generally the same as those that apply to SEC oversight of the [NASD].").[7] But Congress also subjected the Board to even greater SEC authority than the Commission has over SROs. For example, while SRO governing boards are generally selected by their members or shareholders, PCAOB members are appointed by the SEC, after consultation with the Secretary of the Treasury and the chairman of the Federal Reserve's Board of Governors. *See* 15 U.S.C. § 7211(e)(4).[8] In addition, unlike SROs, the PCAOB's budget is subject to SEC approval. *See* 15 U.S.C. § 7219(b); *see also* Nagy, *supra* n.2, at 1025 & n.292 (2005). Thus, as even one of petitioner's own academic amici puts it, the Board "is squarely under the thumb of the SEC's oversight and control." Pritchard, *The Irra-*

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[7] *See, e.g.*, 148 Cong. Rec. at S6334 (statement of Sen. Sarbanes) (citing "importan[ce]" of SEC oversight); 148 Cong. Rec. H1544, H1546 (daily ed. Apr. 24, 2002) (statement of Rep. Oxley) ("We are giving the SEC the tools to oversee this new [regulatory organization]."); *Accounting Reform Hearings*, at 1120 (statement of then-Chairman Pitt) ("[T]he Commission must have a direct role in the operation of the [board]'s regulatory programs by exercising effective and rigorous oversight of its membership, rules, and activities."); *CAARTA Hearings*, at 307 (statement of then-Chairman Pitt) (regulatory body should be "subject to comprehensive and vigorous SEC oversight.").

[8] The requirement of consultation with Treasury (and the Federal Reserve Board) is noteworthy. It not only reflects the importance of accounting and auditing to the national economy, but further confirms that Congress did not design the Board with any purpose of excluding Executive Branch participation in the selection of Board members.

tional Auditor and Irrational Liability, 10 Lewis & Clark L. Rev. 19, 35 (2006).

To the extent advocates of the new oversight board viewed independence from political influence—rather than from the accounting profession—as a goal, the focus was on political pressure not from the Executive branch, but from Congress itself. Congressional pressure was one way the accounting profession had successfully opposed previous reform efforts. *See Accounting Reform Hearings*, at 1035 (statement of Sen. (Ret.) Metzenbaum, Chairman, Consumer Federation of America); *id.* at 849 (testimony of Robert E. Litan, Brookings Institution). For example, some cited pressure from Congress as a reason FASB had been ineffective: "This well-meaning group must defend itself ... from congressional pressure, which is often applied when powerful constituents hope to undermine a rule that might hurt their rulings." *The Fall of Enron: Hearing Before the S. Comm. on Gov'tl Affairs*, 107th Cong. 27 (2002) (testimony of former SEC Chairman Levitt); *see also Accounting Reform Hearings*, at 44 (testimony of former SEC Chairmen Levitt and Williams) (discussing legislative pressure on FASB rulemaking). Members of Congress thus noted the "importan[ce]" of using safeguards such as dedicated funding to curb "influence coming directly from Congress." *Accounting Reform Hearings*, at 1076 (statement of Sen. Gramm); *see also id.* at 186 (statement of Sen. Stabenow) (noting need to "insulate the establishment of accounting standards from politics and pressures, both from the industry and, frankly, from Congress"); *id.* at 913 (statement of Sen. Sarbanes) ("[T]here are tremendous pressure dynamics at work in this arena. Some of them come from Congress, to be quite candid about

it."). Thus, neither in purpose nor effect was the Board designed to be independent of the SEC itself.

D. Congress Rejected Other Possible Structures For The Board For Sound Reasons

Congress considered two polar alternatives that lie on either side of the structure it ultimately enacted: to create a new, independent agency altogether, or to create a new unit within the SEC. Experienced regulators and experts advised Congress, however, that these alternatives would likely create an inefficient or ineffective administrative structure. Congress's rejection of these alternatives thus reveals no purpose to insulate the Board from Executive control.

Congress was advised that an entirely new, standalone agency would likely spawn jurisdictional battles, create redundant regulation, or make it hard to ensure regulatory coherence. Former Chairman Breeden warned, for example, that creating a new entity with an overlapping portfolio, but outside the Commission's control, would lead to turf wars and inefficiency and would "lose the benefit of nearly 70 years" of SEC regulatory experience. *CAARTA Hearings*, at 158-159. Only by putting the Board under complete SEC oversight and control could Congress ensure an efficient and unified regulatory regime. Subjecting the Board to SEC review would "assure that the Board's policies are consistent with the administration of the federal securities laws," S. Rep. No. 107-205, at 12, and alleviate the possibility that the PCAOB might duplicate SEC enforcement efforts, *see* 148 Cong. Rec. H4478, H4479 (daily ed. July 10, 2002) (statement of Rep. LaFalce).

At the other pole, some suggested that Congress not create a new entity, but require the SEC itself to

carry out the expanded standard-setting and disciplinary functions contemplated by Sarbanes-Oxley. *See, e.g., Accounting Reform Hearings*, at 36-38 (discussing proposal of former SEC Chairman Richard C. Breeden); *see also CAARTA Hearings*, at 157-158; *Accounting Reform Hearings*, at 219; *id.* at 704-709, 1027, 1087, 1091. But this suggestion quickly foundered on the fact, as many testified, that the SEC lacked sufficient staff and resources to take on these new responsibilities without diluting its other priorities. As former SEC Chairman Hills testified, "the SEC is way, way short-handed in dealing with accounting problems.... [T]hey do not have the manpower to bring justice swiftly." *Accounting Reform Hearings*, at 38. The Comptroller General agreed. *See CAARTA Hearings*, at 157-158 ("The SEC is already overtaxed as it relates to enforcing the securities laws."); *Accounting Reform Hearings*, at 564 (statement of Comptroller General Walker) ("the SEC's ability to fulfill its mission has become increasingly strained").[9]

Moreover, simply increasing the SEC's funding would not have achieved the long-recognized benefits of the SRO structure. *See, e.g., Accounting Reform Hearings*, at 570 (statement of NASD Chairman Glauber). The ability to attract and retain experienced profes-

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[9] *See also Accounting Reform Hearings*, at 38 (testimony of former SEC Chairman Levitt) ("[T]he SEC is pretty stretched right now in terms of resources."); *id.* at 119 (testimony of Paul Volcker, former Chairman of the Federal Reserve Board) (SEC was insufficiently funded and lacked "sufficient staff to do the review process that it needs to do"); *id.* at 223 (testimony of former SEC Chief Accountant Turner) ("[o]bviously, the SEC does not have the resources or the talent right now" to serve as an "uber-auditor").

sionals focused on specific policy priorities and able to provide their own expert advice to the SEC is the essential and unique benefit of the PCAOB, as of the SROs. That ability would be compromised were the Board's functions simply located inside the SEC. Relatedly, merely increasing the SEC's budget would not have assured that the funds were spent on the accounting problems Congress sought to remedy, given competing, and potentially shifting, SEC priorities. Congress sought to establish an entity with a sustained, focused commitment to the problem at hand and, thus, created a source of funding dedicated directly to that entity.

Thus, far from creating an unprecedented institution "never before seen in American history" (Cato Br. 9), Congress designed the PCAOB as an extension of the SRO model that had structured securities regulation for 70 years (and continues to do so today). Congress built upon and modified that design to create a regulatory system that would be free from capture by the regulated profession and subject to comprehensive oversight by the SEC.

II. Since The Board's Creation, The SEC Has In Fact Exercised Vigorous And Pervasive Oversight

For constitutional purposes, it suffices that the SEC has comprehensive *de jure* authority over the Board. Any doubt on that score, however, should be removed by the fact that, not only does the SEC possess these powers in principle, but the SEC exercises them vigorously in practice. The profound power the SEC possesses and exercises makes clear that (1) Board members are inferior officers, and (2) Board

members are completely subordinate to the SEC, regardless of the structure of the SEC's removal power.

A. SEC Control Over PCAOB Functions

The SEC's statutory authority to disapprove PCAOB rules or budget proposals, reverse the Board's enforcement decisions, or remove Board members and censure the Board—or even rescind its duties altogether—create powerful incentives in advance for the Board to seek and comply with the Commission's direction. The Board must—and does—take account of the SEC's views in all aspects of the Board's work. As a result, the two bodies engage in close, ongoing coordination, as Congress intended. As Christopher Cox, SEC Chairman from 2005 to 2009, has explained, the SEC and the PCAOB routinely "discuss things in development" so that "before the SEC would have to take formal action after the fact to try and influence or adjust or reverse some action, these things are well understood and worked out to start with." *Sarbanes-Oxley at Four: Hearing Before the H. Comm. on Fin. Servs.*, 109th Cong. 24-25 (2006) ("*Sarbanes-Oxley at Four*").

For example, because no PCAOB rule may become effective without the SEC's approval, 15 U.S.C. § 7217(b)(2), and because the SEC can abrogate, delete from, or add to existing Board rules, *id.* § 7217(b)(5), the SEC has enormous leverage over Board rulemaking. That leverage translates in practice into substantial SEC involvement in the development of PCAOB rules from their earliest stages. As then-SEC Chairman Cox has explained, the Board's need for SEC approval

> requires a high level of coordination between the SEC and the PCAOB. If a standard were approved by the Board and not by the Commission, not only could it never take effect but valuable time would be lost when the entire effort would have to begin anew.

Unofficial Transcript of Meeting of Commissioners (Apr. 4, 2007).[10] Thus, during development of PCAOB rules and auditing standards, long before the Board ever submits a proposed rule or standard to the Commission, SEC and PCAOB staff consult and coordinate closely. After submitting an initial proposal, the Board often must continue to refine proposed rules in accordance with SEC staff recommendations in order to secure Commission approval.[11] And when approving final Board rules, the Commission may continue to control PCAOB rulemaking by issuing its own interpretive releases, allowing it to place its own stamp on how the Board's new rule should be applied and to ensure that PCAOB and SEC rules are appropriately aligned.[12]

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[10] Unless otherwise noted, all cited SEC documents, orders, statements, and other materials are publicly available on the Commission's website, at www.sec.gov. Similarly, all cited PCAOB materials are publicly available online at www.pcaobus.org. *See supra* pp. v-x.

[11] For example, the Board has changed previously submitted proposed rules in response to SEC staff concerns that a rule might have unintended consequences for the interpretation of other securities laws. *See, e.g.*, Audio Webcast: PCAOB Open Meeting, at 48:19-59:43 (Nov. 22, 2005); Board Approves 2006 Budget, Amendments to Tax Rules (Nov. 22, 2005).

[12] For example, when approving the PCAOB's Auditing Standard No. 1 in 2004, the Commission simultaneously issued its own interpretive release to address implementation of the newly

The SEC's close control of Board functions is exemplified by the Commission's role in the development of PCAOB rules implementing Section 404 of the Sarbanes-Oxley Act, 15 U.S.C. § 7262. Section 404, which requires auditors to evaluate and report on the effectiveness of public companies' internal control structures and procedures, had become one of the most controversial provisions of Sarbanes-Oxley. *See, e.g.*, *The Impact of the Sarbanes-Oxley Act: Hearing Before the H. Comm. on Fin. Servs.*, 109th Cong. 53-54 (2005) ("*Impact of Sarbanes-Oxley*") (statement of then-SEC Chairman Donaldson); Pritchard, *supra*, at 21. Addressing the costs Section 404 imposes thus became an important Executive branch priority.[13]

At the Administration's urging, the SEC worked closely with the PCAOB over a period of two years to develop a new standard for implementing Section 404. *See* SEC Approves PCAOB Auditing Standard No. 5

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approved standard and clarify its impact on other rules and regulations. *See* Order Approving Proposed Auditing Standard No. 1, SEC Release No. 34-49707 (May 14, 2004); Commission Guidance Regarding the Public Company Accounting Oversight Board's Auditing and Related Practice Standard No. 1, SEC Release No. 33-8422 (May 14, 2004). Similarly, when it approved the PCAOB's Auditing Standard No. 4 and related Board rules, the SEC provided its own guidance in the approval order on issues the new standard raised. *See Sarbanes-Oxley at Four*, at 63 (2006) (statement of SEC Chairman Cox); *see also* Order Approving Proposed Auditing Standard No. 4, SEC Release No. 34-53227 (Feb. 6, 2006).

[13] *See, e.g.*, George W. Bush, Remarks on the National Economy in New York City, 2/5/07 Weekly Comp. Pres. Doc. 99, 2007 WLNR 3002163 (Feb. 5, 2007); Remarks by Treasury Secretary Henry M. Paulson on the Competitiveness of U.S. Capital Markets, Economic Club of New York (Nov. 20, 2006), *available at* http://www.treas.gov/press/releases/hp174.htm.

Regarding Audits of Internal Control Over Financial Reporting; Adopts Definition of "Significant Deficiency," SEC Press Release No. 2007-144. Throughout this rulemaking, the PCAOB engaged in "frequent—if not daily—dialogue with the SEC at all levels of both organizations." Remarks of PCAOB Chairman Olson on the Proposed New Standard Concerning the Audit of Internal Control 1-2 (Dec. 19, 2006).

This close coordination was aimed in part at ensuring that the Board's rule would be consistent with the SEC's own implementation of Section 404. *See, e.g.*, Statements of SEC Chairman Christopher Cox and Chief Accountant Conrad Hewitt Regarding PCAOB's Proposed Section 404 Auditing Standard, SEC Press Release No. 2006-213 (Dec. 19, 2006) (SEC and Board are "work[ing] together" to ensure Commission's proposed interpretative guidance and PCAOB's proposed standard are "mutually reinforcing"); SEC Release No. 34-55876 (June 7, 2007) (consultations sought to "[a]lign[] the PCAOB's new auditing standard ... with the SEC's proposed new management guidance").[14] Thus, in response to SEC direction, the Board refined its proposal to conform it to the SEC's policy preferences for implementing 404 and to the guidance the SEC was providing to corporate managers. As PCAOB Chairman Olson stated when the Board issued its proposed standard:

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[14] *See also Impact of Sarbanes-Oxley*, at 9, 54, 56-57 (testimony and statement of then-SEC Chairman Donaldson) (Commission and PCAOB are "closely coordinating" to clarify issues and reduce costs of implementing Section 404); *Sarbanes-Oxley at Four*, at 24-25, 61 (2006) (testimony of then-SEC Chairman Christopher Cox) (SEC working with PCAOB to ensure Section 404's improved implementation).

> We have ... worked closely with counterparts at the SEC to ensure that the recommendations are consistent with the guidance provided by the Commission ... , which included the importance of appropriately coordinating the standard with the SEC's management guidance[.]
>
> Importantly, the package before us today is also responsive to the comments received on the proposals and guidance provided by the SEC. I would like to acknowledge the important and open dialogue we have had with Chairman Cox and the SEC Commissioners, and the value the SEC staff has added to this initiative.

Open Meeting, Introductory Statement of Chairman Olson On the New Standard Concerning The Audit of Internal Control 4, 5-6 (May 24, 2007); *see also* SEC Release No. 34-55876 (June 7, 2007) (Board proposal reflected "careful consideration of ... input from the SEC").

Moreover, when the SEC in July 2007 approved the PCAOB's new Auditing Standard No. 5, which implemented Section 404, the Commission exercised further control by promulgating its own new definitions and guidance to harmonize the PCAOB's new standard with the SEC's own rules. *See* SEC Press Release No. 2007-144. These SEC-PCAOB rulemaking efforts, in turn, reflected and served the Executive branch's goal of reducing audit costs by adopting a standard designed to "ensur[e] that the internal control audit is top down, risk based, and focused on what truly matters to the

integrity of a company's financial statements," as the Administration had recommended.[15]

The SEC's vigorous exercise of control over the Board's statutory functions is further illustrated by implementation of the Act's registration and inspection requirements. Section 106 of the Act subjects foreign accounting firms to the same registration and inspection requirements as U.S. firms. *See* 15 U.S.C. § 7216(a)(1). Like Section 404, the foreign-firm registration requirement became a controversial provision of substantial importance. And like Section 404, application of the registration and inspection requirements to foreign firms was the subject of close SEC oversight of the Board.[16] The SEC, for example, convened a roundtable for discussion with foreign regulatory authorities, foreign accounting firms, and investor groups, at which SEC and Board leadership and staff jointly participated, to assess the concerns of these key actors. *See Accounting Under Sarbanes-Oxley: Hearing Before the H. Comm. on Fin. Servs.*, 108th Cong. 11, 54 (2003) (testimony and statement of then-SEC Chairman William H. Donaldson). As a result, the Board proposed, and the SEC approved, registration rules that required foreign auditing firms to register but

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[15] *See* Remarks by Treasury Secretary Henry M. Paulson on the Competitiveness of U.S. Capital Markets Economic Club of New York, *supra* n.13 (endorsing SEC's and PCAOB's implementation of Administration's preferred reforms to internal control audits under Section 404).

[16] *See, e.g.*, SEC Annual Report 2003, at 28 (2004) (SEC "worked with the [Board] to address the concerns of foreign authorities regarding the international implications of the PCAOB's system for registering accounting firms").

eased the burdens of doing so. *See id*; *see generally The PCAOB and the Oversight of Non-U.S. Auditors*, Remarks by PCAOB Board Member Daniel L. Goelzer (Apr. 19, 2004). And in later rulemakings, the PCAOB continued to follow SEC directives in developing a cooperative framework for inspection of registered foreign firms. *See* Order Approving Proposed Rules Relating to Oversight of Non-U.S. Registered Public Accounting Firms, SEC Release No. 34-50291 (Aug. 30, 2004). The SEC has thus vigorously exercised its statutory authority over the Board's rulemaking and other functions to control the Board's actions and ensure their alignment with SEC policy.[17]

B. SEC Authority To Review And Approve The PCAOB's Budget

The SEC's complete control over the Board's budget provides the SEC with one of its most potent tools to control all the Board's actions. The SEC must approve the PCAOB's annual budgets, as well as the user fees established each year to fund the Board. *See* 15 U.S.C. § 7219(b), (d)(1). As with the Board's rulemaking and enforcement, the SEC's approval authority has translated in practice into substantial control over the Board's actions at their inception. In particular, the

---

[17] PCAOB enforcement and disciplinary proceedings are private, *see* 15 U.S.C. § 7215(c)(2), but publicly available evidence indicates that the SEC has been just as active in overseeing those activities as in other areas. *See, e.g.*, PCAOB 2005 Annual Report 17 (PCAOB enforcement staff "works closely" with the SEC to coordinate investigations); PCAOB 2007 Annual Report 12 (same); *see also* Remarks of the SEC Associate Chief Accountant Before the 2005 AICPA National Conference on Current SEC and PCAOB Developments (Dec. 5, 2005) (same).

SEC has closely coordinated with the PCAOB in developing the Board's annual budgets; indeed, the SEC has established a formal review process for doing so. Moreover, the SEC has used that authority to influence the Board's implementation of the Act.

As in other areas, the SEC works closely and informally with the PCAOB before the Board submits a proposed budget. For example, SEC and PCAOB staff began meeting in August 2005 to develop the Board's proposed 2006 budget and ensure that the PCAOB supplied all information necessary for the Commission to review and approve the budget. *See* Order Approving Public Company Accounting Oversight Board Budget And Annual Accounting Support Fee For Calendar Year 2006, SEC Release No. 33-8676 (Apr. 13, 2006). Likewise, the PCAOB's 2007 budget was the result of "many months of close-knit teamwork and coordination between" the Board and the Commission. Speech by SEC Commissioner: Remarks Before the SEC Open Meeting on the 2007 PCAOB Budget by Commissioner Roel C. Campos (Dec. 4, 2006). As one SEC Commissioner explained:

> Our budget dialogue with the PCAOB ... included countless briefings and communications between our relative staffs [and] engaged all of the Commissioners' offices[.]
>
> The total package ... positively reflects many months of feedback, review, and communication between the PCAOB and the SEC on issues ranging from the purely administrative ... to strategic decisions that have wide-spread policy and programmatic implications in core substantive areas like inspections, enforcement, and the Office of the Chief Auditor.

Id.

Where the PCAOB has failed to incorporate the SEC's views into the initial budget, the Commission has forced the PCAOB to reconsider. During the 2005 budget cycle, for example, the PCAOB submitted a proposed budget that did not satisfy SEC staff. The SEC raised several concerns with the initial proposal and required the Board to revise it. After the Board addressed these concerns, the SEC approved the revised budget. *See* Order Approving Public Company Accounting Oversight Board Revised Budget and Annual Accounting Support Fee for Calendar Year 2005 (Mar. 3, 2005); *see also* Speech by SEC Staff: Opening Remarks before the Open Meeting on PCAOB Budget and PCAOB and FASB Support Fees by Donald T. Nicolaisen, Chief Accountant, U.S. Securities and Exchange Commission (Mar. 3, 2005).

To regularize these review procedures, "the SEC and the PCAOB ... established a formal process for the determination of the Board's annual budget and accounting support fees." *Sarbanes-Oxley at Four*, at 61 (statement of SEC Chairman Cox). In this review process, "both [agencies'] staffs ... interact, analyze, and prepare a sound and appropriate budget on an annual basis" with the goal of "ensuring that the PCAOB's budget is created and considered in a timely and comprehensive manner, and with the full input of relevant staff at both the PCAOB and the SEC." Speech by SEC Commissioner: Remarks Before the SEC Open Meeting on the 2007 PCAOB Budget by Commissioner Roel C. Campos (Dec. 4, 2006). As one SEC Commissioner explained, the budget-review process "sets forth a very clear and reasonable framework for annual approval of the PCAOB's budget, and memorializes a framework for ongoing communication,

transparency, and feedback between the PCAOB and the SEC." *Id.*; *see also Sarbanes-Oxley at Four*, at 24-25 (testimony of then-Chairman Cox).

The SEC has used this budgeting authority as a means to influence and supervise the Board's rulemaking and inspection activity. For example, in approving the PCAOB's 2009 budget, the SEC required the Board to consult with the Commission about implementing the recommendations of a Treasury Department advisory committee. The SEC directed the Board, in particular, to submit a project plan to the Commission and provide an opportunity for the Commission to respond before the Board began developing proposed rules to implement Treasury's recommendations. *See* Order Approving Public Company Accounting Oversight Board Budget and Annual Accounting Support Fee For Calendar Year 2009, SEC Release No. 33-8989, at 4 (Dec. 17, 2008). Similarly, the SEC directed the PCAOB to include in its quarterly reports to the Commission "information on the PCAOB's fulfillment of its 2009 budgeted inspection plan," including statistics on the number and type of firms expected to be inspected in 2009 and updates on the PCAOB's efforts to cooperate with non-U.S. regulators regarding the inspection of foreign accounting firms. *See id.* at 3-4. In practice, then, the SEC's statutory authority to review and approve the Board's budgets has provided the Commission with opportunities not only to heavily influence—if not dictate—the Board's annual budgets, but also to control the PCAOB's actions and policies.

C. SEC Authority To Inspect The PCAOB

The SEC also directs and supervises PCAOB actions through the SEC's statutory inspection authority. Under the 1934 Exchange Act and subsequent amend-

ments, the SEC may examine the records of self-regulatory organizations any time the Commission deems it necessary or appropriate. *See* 15 U.S.C. § 78q(b)(1); *see also id.* § 78q(a)(1). Sarbanes-Oxley made these provisions applicable to the PCAOB, *id.* § 7217(a).

In practice, this inspection authority has provided the SEC with yet another effective means of supervising the Board's activities. The Commission has used its inspection authority, for example, to set long-range goals for the Board and examine whether the Board is fulfilling those aims. As then-SEC Chairman William Donaldson described to Congress in 2005:

> [T]he Commission and the Board have forged a close working relationship. In addition to coordinating with us on major projects related to auditing matters, the PCAOB has agreed to prepare a long-range strategic plan for its operations and budget as well as a self-assessment of the internal controls for its operations and budget. In addition, the Commission is preparing to conduct its initial examination of the PCAOB, as contemplated by Section 107(a) of the Act. We anticipate receiving the strategic plan and self-assessment and commencing our initial examination of the PCAOB prior to our review of the PCAOB's 2006 budget, in accordance with our statutory responsibility to oversee the PCAOB.

Impact of Sarbanes-Oxley, at 48. The following year, Chairman Donaldson's successor agreed that the SEC's inspection authority had been "an important aspect of the Commission's general oversight" of the Board.

Sarbanes-Oxley at Four, at 63 (statement of then-Chairman Cox).

SEC oversight of the PCAOB's implementation of internal control audits under Section 404 of the Sarbanes-Oxley Act, *see supra* p. 22, again illustrates the way the SEC exercises its authority. To gather information about implementation of Section 404, the SEC used its inspection authority to examine the PCAOB's process of inspecting registered accounting firms. Chairman Cox thus informed Congress in 2006 that the Commission intended to "focus[] [its] next inspection of the PCAOB on its largest program area—inspections of registered public accounting firms under Sarbanes-Oxley 404 and [the existing PCAOB Auditing Standard]" with the goal of "achiev[ing] greater compliance with the Commission's and the PCAOB's own guidance that [internal control] audits be risk-based and cost-effective." *Sarbanes-Oxley at Four*, at 63. Chairman Cox elaborated that the purpose of the SEC's inspection would be "to make sure that they are doing what we think they are doing." *Id.* at 24-25.

After the PCAOB adopted and the SEC approved the new standard for implementing Section 404, the SEC again continued its inspection and used that authority to monitor whether the PCAOB's inspections were conducted consistently with the SEC's expectations under the new rules.[18] As stated in its order approving the new standard, the Commission would continue to use its inspection authority to "carefully moni-

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[18] *See* Video of SEC Chairman Christopher Cox's statement on the PCAOB auditing standard and definition of "Significant Deficiency" at the SEC's Open Meeting (July 25, 2007), *available at* http://www.sec.gov/news/press/2007/2007-144.htm (follow link).

tor[]" the implementation of the new standard, including "examin[ing] whether the PCAOB inspections of registered accounting firms have been effective" in achieving the Commission's expectations. Order Approving Proposed Auditing Standard No. 5, SEC Release No. 34-56152, at 9 (July 27, 2007).

D. SEC Power To Censure The Board Or Remove Its Members

Apart from these other means of oversight and control, the SEC may also take the ultimate step of forcing the removal of a Board member, censuring the Board or its members, or limiting or rescinding the Board's authority altogether. 15 U.S.C. § 7217(d). Though the SEC has not yet been compelled to invoke those powers, the Commission's experience imposing punitive measures against the SROs in other contexts demonstrates how powerful tools like these can be—including the mere threat of their use.

The SEC's powers to censure SROs, remove their directors and officers for cause, or strip them of authority have enabled the SEC to force changes in SRO management, along with other major reforms. In the mid-1990s, for example, when problems emerged in the Nasdaq over-the-counter market, the SEC investigated the NASD's regulatory efforts, concluded the NASD had failed to carry out its disciplinary responsibilities, and successfully insisted on new management for the NASD and the Nasdaq. *See* Seligman, *The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance* 698-702 (3d ed. 2003). At the same time, the SEC reached a settlement with the NASD censuring it for failing to comply with its statutory obligations and ordering it to undertake numerous reforms—including

adopting new rules and altering management and staffing structures. In announcing that settlement, the SEC noted several other occasions on which it had censured other SROs and ordered them to undertake reforms or pay substantial fines. *See* Report Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding the NASD and Nasdaq Market 50 n.111 (Aug. 1996); *see also* SEC Release No. 34-51163 (Feb. 9, 2005) (requiring NASD to undertake remedial measures in light of failures SEC investigation identified).

As noted above, the SEC has even more power over the Board than the SROs. *See supra* pp. 15-16; *see also* Pritchard, *supra*, at 33 (SEC's authority to "direct[] and control" the PCAOB is "substantially more intrusive" than the authority it exercises with respect to SROs). Yet as just illustrated, the SEC has been able to force dramatic management changes even in the SRO context. Thus, any notion that the SEC, which appoints the Board, controls its budget, and can completely neuter it, cannot force management changes at the Board blinks reality. The former Chairmen have no doubt that, should it choose, the SEC can dictate Board management.[19]

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[19] With respect to petitioners' argument that the Chairman rather than the Commission as a whole is the "Head" of the SEC within the meaning of the Appointments Clause, the former Chairmen note that, contrary to petitioners' assertion (Pet. Br. 61-62), the Chairman alone does not appoint the SEC's Division Heads and General Counsel. No appointment of major SEC personnel can be made unless the Commission approves the appointment, even when the Chairman has the power to initiate the process. Thus, as the Solicitor General correctly notes, even when the Chairman may initiate an appointment, that casts no doubt on the fact that the Commissioners collectively are the "Head" of the SEC for Appointments Clause purposes. *See* U.S. Br. 41-42 (citing

* * *

Since the 1930s, financial regulation has been characterized by a unique set of public-private regulatory structures, with the SEC atop this system. In response to massive failures of accounting and auditing regulation, Congress created the PCAOB as the latest installment in the development of these structures, and subjected it to the SEC's plenary control to ensure effective and unified regulation of the accounting profession. The SEC's legal authority on paper to direct and supervise the PCAOB fully satisfies the Constitution's requirements. But the Commission's actual exercise of that authority in practice confirms that the Board is subject to the Commission's constant control and oversight in every facet of its operations—just as Congress intended. In this context, focusing on the SEC's power to remove Board members in isolation, as petitioners do, fundamentally misapprehends the legal powers the SEC wields over the Board and the practical effect of those powers. With or without at-will removal power, the SEC has effective authority over every action the Board might propose or take. Particularly in light of the unique, long-established history of financial regulation, petitioners' constitutional challenges are inconsistent with this Court's precedent, the powers of the SEC over the PCAOB, and the realities of the SEC-PCAOB relationship in practice.

Reorganization Plan No. 10 of 1950 § 1(b)(2), 5 U.S.C.A. App. 1, at 124 (2007)). Moreover, in the former Chairmen's decades of experience, the Chairman, even when authorized to initiate an appointment, routinely solicits input on possible candidates from the other Commissioners. No meaningful distinction exists, in practice, between whether the Chairman or the Commission has the formal power to initiate an appointment.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted.

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v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT
BOARD AND UNITED STATES OF AMERICA,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia**

AMICUS CURIAE BRIEF ON THE MERITS OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, FREE ENTERPRISE FUND AND BECKSTEAD AND WATTS, LLP

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AMICUS CURIAE BRIEF ON THE MERITS OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, FREE ENTERPRISE FUND AND BECKSTEAD AND WATTS, LLP

Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief on the merits on behalf of itself and its members in support of Petitioners, Free Enterprise Fund and Beckstead and Watts, LLP.[1]

INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest law firm organized under the laws of the State of Colorado with more than 5,000 members. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government.

MSLF has long been active in litigation aimed at ensuring that the Constitution is interpreted in

[1] Pursuant to Supreme Court Rule 37.3(a), counsel of record states that the parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

accordance with its text, the intent of the Founders, and the political theories informing that intent. MSLF believes that the United States Court of Appeals for the District of Columbia Circuit has departed from that principle. In this brief, MSLF will attempt to persuade this Court that it should return to this principle of constitutional construction by overruling a line of cases that has departed from this principle. In so doing, this Court must reverse the District of Columbia Circuit Court of Appeals and hold that the Congress unconstitutionally created the Public Company Accounting Oversight Board ("PCAOB") in violation of the Doctrine of Separation of Powers.

INTRODUCTION

The plain language of the United States Constitution vests all federal executive power in the President of the United States, subject only to specific constitutional limitations. That power is plenary. The intent of the Founders and the political theory of their day support that conclusion. The Constitution provides no power to Congress to control or condition the removal of officers or employees who implement, administer, or carry out the laws of the United States; that power is vested solely in the President. Certain cases of this Court that do not support this principle should be overruled and the decision of the District of Columbia Circuit Court of Appeals in the case at issue should be reversed.

MSLF does not believe that this Court *must* overrule any prior cases in order to find that Congress's creation of the PCAOB violates either the Doctrine of Separation of Powers or the Appointments Clause. In that regard, MSLF agrees with Petitioners. MSLF believes, however, that the jurisprudence of this Court has for many years departed from both the constitutional text and the intent of the Founders regarding Congress's power to create independent agencies and to limit the executive power of the President with respect thereto.

This case presents this Court with a prime opportunity to revisit the issue of independent agencies and to correct the wrong constitutional turn taken by this Court in prior years. Under current law, all Congress need do is determine that an agency executing the laws of Congress should be independent of the President and it may make it so. Under that jurisprudence, the President becomes no more than a minion of Congress, acting in accordance with Congress's directives. This Court must end the current practice of unguided, ad hoc determinations, lacking justiciable standards, to decide the constitutionality of Congress's incursions into executive authority through its creation of independent agencies.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE UNITED STATES CONSTITUTION VESTS ALL EXECUTIVE POWER IN ONE PERSON, THE PRESIDENT.

The first three Articles of the Constitution of the United States delineate the structure of the government of the United States. The Founders believed that all governmental power consist of only three categories – legislative, executive, and judicial – that is reflected in the Constitution, which vests these powers in three separate, distinct, and co-equal divisions of government:

> All legislative Powers *herein granted*, shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. art. I, § 1 (emphasis added).

> The executive Power *shall be vested* in *a* President of the United States of America.

U.S. Const. art. II, § 1 (emphasis added).

> The judicial Power of the United States *shall be vested* in one Supreme Court and such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const. art. III, § 1 (emphasis added).

At issue here is the nature and the extent of the power vested by the Constitution in the executive

branch and the degree to which, if at all, Congress may intrude upon that power. The Constitution of the United States unambiguously vests *all* executive power in one person, the President of the United States. This plenary power must, of necessity, include the power to execute, enforce, administer, carry out, and implement the laws of the United States enacted by Congress, and to appoint, remove, control, and supervise the officers, inferior officers, and employees who engage in those functions. In contrast, the Constitution vests Congress with legislative powers only as "herein granted." Unlike the President, Congress "can exercise only the powers granted to it" in other sections of the Constitution. *McCulloch v. Maryland*, 4 U.S. (4 Wheat) 316, 405 (1819).

Looking at the first three Articles together is informative in understanding the constitutional structure. Articles II and III resemble one another more than either resembles Article I. Neither of those Articles contains a "herein granted" provision, and both are vested with complete power in their respective spheres of government. Section 2 of these Articles differs, however. Section 2 of Article III begins with the limiting phrase, "The judicial power shall extend to. . . ." This phrase makes it clear that the enumerated jurisdictional powers that follow are exclusive. No such limiting phrase exists in Section 2 of Article II, however. Rather, that Section merely places limits on particular executive powers granted by Section 1 of Article II but does not otherwise limit the plenary executive power granted by Section 1. For

example, certain presidential appointments and treaties require the consent of the Senate, the power of pardon does not extend to impeachment, only Congress may declare war or issue letters of marquee and reprisal, and Congress may vest appointment of inferior executive officers, without Senate consent, in the President, Judiciary, or department heads. U.S. Const. art. II, § 2.

These limits constitute the exclusive powers of Congress to check the plenary executive power of the President, which necessarily includes all power over removal, or the conditions of removal, of executive officers and employees, principal or inferior, irrespective of who may have appointed them. Thus, all power to control and supervise after appointment is solely executive and vested in the President.

This clear and unambiguous constitutional structure does not provide for or contemplate the burgeoning "independent agencies" that owe their existence and the tenure of their officers to Congress rather than the President. Indeed, in some cases, as here, these agencies are essentially independent of any of the three branches of government. Nor does the Constitution's plain language permit the creation of so-called "quasi" powers, such as quasi-judicial or quasi-legislative power. Under the Constitution's clear language, there are only three powers, which the Constitution divides solely among the three separate and distinct branches of government, subject only to the very limited blending of powers specifically provided for to allow each branch the

ability to check and moderate the others, as discussed infra.

Thus, the plain language does not allow a governmental body to be part of more than one branch of government. The Constitution provides Congress with no power to vest implementation of its laws in any other than the executive branch, the sole person responsible for which is the President, even though the legislation contemplates some rule-making or adjudication. Under the plain language of the Constitution, a power is executive if it enforces, carries out, implements, or executes congressional legislation or controls and supervises those who do so.

II. THE POLITICAL THEORY ON WHICH THE FOUNDERS BASED THE STRUCTURE OF THE CONSTITUTION SUPPORTS AND REINFORCES THE PLAIN LANGUAGE OF THE CONSTITUTION.

The political theories of government employed by the Founders support and reinforce the plain language of the Constitution. The concept of government and political theory employed by the Founders in drafting the Constitution is set forth in *The Federalist*:

> [T]he authors of the Publius letters set forth more comprehensively, and in a form more nearly final than is elsewhere found, theories reflective of the course of constitutional government and theory in this country up to 1787.

The Federalist at 77 (Benjamin Fletcher Wright ed., 1961). Central to this understanding is the concept that government must be composed of separate and balanced departments, whose powers are blended just enough that each will check and moderate the others, thus endowing the people with a maximum degree of liberty.

A. The Legislative Branch Is The Most Powerful Branch And The One Most Likely To Encroach On The Powers Of The Others, Requiring More Checks And Balances On Its Power.

The Founders believed that concentration of governmental power leads to tyranny and that dispersal of this power is necessary to preserve liberty. But the Founders also believed that, because complete separation of the branches could lead to tyranny, there must be a limited blending of powers among the branches, thus allowing each branch to check and moderate the others. The branch most capable and most likely to draw power to itself and, therefore, requiring more checks from the other branches, is the legislative. This is demonstrated in discussions in *The Federalist* Nos. 47, 48, and 51 (James Madison).

Madison wrote that "the accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny." *The Federalist* No. 47 at 336 (James Madison)

(Benjamin Fletcher Wright ed., 1961). "The powers that properly belong to one of the departments ought not to be directly and completely administered by either of the other departments" because "*power is of an encroaching nature, and . . . ought to be effectually restrained from passing the limits assigned to it.*" *The Federalist* No. 48 at 343 (James Madison) (Benjamin Fletcher Wright ed., 1961) (emphasis added).

Madison then laid out the structure by which the Constitution "maintain[s] . . . the necessary partition of power among the several departments. . . ." *The Federalist* No. 51 at 355 (James Madison) (Benjamin Fletcher Wright ed., 1961). The Constitution, Madison explained, recognizes that the "separate and distinct exercise of the different powers of government . . . is . . . essential to the preservation of liberty." *Id.* Indeed, "each department should have a will of its own [and] should be so constituted that the members of each should *have as little agency as possible in the appointment of the members of the others.*" *Id.* (emphasis added).

Therefore, in setting up these independent co-equal departments, the Constitution so "contriv[es] the interior structure of government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." *Id.* Thus, "the great security against a gradual concentration of the several powers in the same department consists in *giving those who administer each department the necessary constitutional means and personal motives to resist the*

encroachments of the others." *Id.* at 356 (emphasis added). In other words, to control and moderate each other the branches must "be so far connected as to give to each a constitutional control over the others." *The Federalist* No. 48 at 343 (James Madison) (Benjamin Fletcher Wright ed., 1961). Because some branches of government are more powerful than others, "some more adequate defense is indispensably necessary for the more feeble, against the more powerful, members of the government." *Id.*

Madison identified the legislative branch as the most powerful, stating, "The legislative department is *everywhere extending the sphere of its activity*, and *drawing all power into its impetuous vortex.*" *Id.* (emphasis added). In fact "it is *against the enterprising ambition* of [the legislative] department that the people ought to indulge all their jealousy and *exhaust all their precautions.*" *Id.* at 344 (emphasis added). Madison believed that the executive branch required protection and self-defense mechanisms against an overreaching legislative branch:

> Its constitutional powers being at once more extensive, and less susceptible of precise limits it can, with the greater facility, *mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments*. . . . Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other

> departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.

Id. at 344-45 (emphasis added).

The case before this Court demonstrates just how overreaching and enterprising Congress is and the foresight of the Founders. In establishing the PCAOB, Congress engaged in unconstitutional encroachment on the executive branch through a complicated and indirect measure that attempts to draw executive power into its "impetuous vortex." Congress attempted to eviscerate the power of the President by the creation of not only the PCAOB, but of all other agencies independent of the President's supervision and control.

These power grabs demonstrate unequivocally why the provisions for self-defense of the executive must "be made commensurate to the danger of attack." *The Federalist* No. 51 at 356 (James Madison) (Benjamin Fletcher Wright ed., 1961). Because "ambition must be made to counteract ambition" the Constitution puts in place a system "of opposite and rival interests. . . ." *Id.* "[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other – that the private interest of every individual may be a sentinel over the public rights." *Id.*

Madison, once again recognizing the predominance of the legislative branch, opined, "It is not possible to give each department an equal power of

self-defense, [because] in republican government, the legislative authority predominates." *Id.* He explained that the "the remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions . . . will admit." *Id.* at 357. But even more precautions may be needed "against still further dangerous encroachments [by the legislature]." Accordingly, "as the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require . . . that it should be fortified." *Id.* Thus, it is the aim of the Constitution that "different governments will control each other, at the same time that each will be controlled by itself." *Id.*

Madison's writings demonstrate that the Founders greatly distrusted the legislative branch and its ability to, and predilection for, restricting executive power and drawing all power to itself. They make clear that legislation that in any way intrudes upon the power of the President must be examined carefully and with skepticism to determine whether the legislature is encroaching on the executive power.

B. The Constitution Vests All Executive Power In One Person.

The protection of the executive power requires vesting all such power in one person, the President. Alexander Hamilton discusses the reasons therefor in

The Federalist Nos. 69, 70, 71, and 76 (Alexander Hamilton). He first explains that Article II, § 2, by providing limitations on the executive power, distinguishes the President from the King of Great Britain, who possessed far more formidable powers. *The Federalist* No. 69 (Alexander Hamilton). Hamilton also emphasizes the need to rigidly control the Congress, using the strongest, most emphatic language found in *The Federalist* to describe the corruptive and intrusive nature of the power in the legislature:

> To what purpose separate the executive . . . from the legislative, if . . . the executive . . . [is] so constituted as to be at the absolute devotion of the legislative? . . . The *tendency of the legislative authority to absorb every other*, has been fully displayed and illustrated by examples in some preceding numbers. In governments purely republican, this tendency is almost irresistible. The *representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves*, and betray strong *symptoms of impatience and disgust at the least sign of opposition* from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an *imperious control over the other departments*; and as they commonly have the people on their side, they always *act with such momentum as to make it very difficult*

> *for the other members of the government to maintain the balance of the Constitution.*

The Federalist No. 71 at 460 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (emphasis added).

C. One Person Promotes The Necessary Energy Needed By The Executive Branch And The Responsibility To The People That Is Critical To Preserve Liberty.

1. The executive branch requires energy.

In *Federalist* No. 70 Hamilton explains that it is essential to vest all the executive power in one person because that promotes both energy and safety, or responsibility, the two most important and necessary characteristics of executive power. "Energy in the Executive is a leading character of the definition of good government." *The Federalist* No. 71 at 451 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). Energy equates to "decision, activity, secrecy, and dispatch." *Id.* at 452.

"Unity [of executive power] is conducive to energy." *Id.* at 451-52. The elements of energy "will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished." *Id.* at 452. This is so because "wherever two or more

persons are engaged in any common enterprise . . . there is always the danger of difference of opinion." *Id.* at 453. Such dissension "counteracts those qualities in the Executive which are the most necessary ingredients in its composition, vigor and expedition. . . ." *Id.* at 454.

2. Responsibility of the President to the people is an essential element of executive power.

Safety is the other ingredient the executive branch must provide and requires, "in a republican sense . . . a due dependence on the people, and secondly a due responsibility [to the people]." *Id.* at 452. The "weightiest objections to a plurality of the Executive . . . is that it *tends to conceal faults and destroy responsibility*." *Id.* at 455 (emphasis added). Hamilton explained the criticality of responsibility placed in a single executive:

> It is evident from these considerations, that the plurality of the Executive tends to deprive the people of the *two greatest securities they can have for the faithful exercise of any delegated power, first*, the *restraints of public opinion*, which lose their efficacy . . . ; and, *secondly*, the *opportunity of discovering with facility and clearness the misconduct of the persons they trust*, in order either to their removal from office or to their actual punishment. . . .

Id. at 456 (emphasis added).

Thus, "in a republic . . . every magistrate ought to be personally responsible for his behavior in office. . . ." *Id.* "In the American republic . . . responsibility that does not rest on the shoulders of a single person . . . would serve to destroy . . . the necessary responsibility of the Chief Magistrate himself." *Id.* at 457. Accordingly, "the executive power is more easily confined to one [and] it is *far more safe there should be a single object for the jealousy and watchfulness of the people.*" *Id.* (emphasis added).

Hamilton then explained the great danger to political responsibility when all power is not concentrated in one person, as exemplified and demonstrated by the PCAOB:

> When power . . . is placed in the hands of so small a number of men as to admit of their views being easily combined in a common enterprise . . . it *becomes more liable to abuse, and more dangerous when abused, that if it be lodged in the hands of one man; who from the very circumstances of this being alone, will be more narrowly watched and more readily suspected. . . .*

Id. (emphasis added). The PCAOB is just such a body in which great powers are concentrated and in which no responsibility can be assigned by the people for its abuse.

Thus, the structural components of the Constitution require that all exercise of all executive power be vested in one person who is politically accountable to

the people. The PCAOB violates this critical principle of liberty by concentrating power in a few, not responsible to any branch of government, even the President.

D. Independent Agencies Are Anathema To Constitutional Structure.

The concept of independent agencies, plural bodies of persons wielding executive power, over whom the President exercises little if any control or supervision, is anathema to the structure of the Constitution. The Founders intended that no executive activity be "independent" of or free from political accountability. However laudable the goals for independence from the President may arguably be, the plain language of the Constitution, supported by the political theories on which it is based, does not allow it. Consequently, there is no place under the Constitution for the Securities and Exchange Commission ("SEC"), much less the PCAOB, which the SEC appoints and "supervises," unless the President has the power of removal from those bodies at will.

Thus, whenever Congress creates an executive agency to exercise any executive function, it unconstitutionally transfers executive power from the President and thereby brings executive functions under its own domination and control, or at least removes them from control of the President. This is a clear violation of the Doctrine of Separation of Powers and flies in

the face of the constitutional structure so meticulously spelled out in the Constitution.

III. CASE LAW SUPPORTS THE PROPOSITION THAT ALL EXECUTIVE POWER IS VESTED IN THE PRESIDENT BUT UNACCOUNTABLY RECOGNIZES MORE POWER IN CONGRESS THAN IS SUPPORTED BY THE CONSTITUTIONAL TEXT.

A. *Myers v. United States* Correctly Holds That Section 1 Of Article II Vests All Executive Power, Including Removal Power, In The President, And That The Blended Powers Of Congress, Contained In Section 2 Of Article II, Should Be Strictly Construed And Not Be Extended By Implication.

The case of *Myers v. United States*, 272 U.S. 52 (1926) presented this Court with an opportunity to confirm that the executive power is plenary and vested in the President by Section 1 of Article II of the Constitution. It also established that removal power is included within that power. At issue was whether the President could remove at will a postmaster appointed to a four-year statutory term by the President with the advice and consent of the Senate. Chief Justice Taft, writing for the Court, stated the issue before the Court: "This case presents the question whether under the Constitution the President has the exclusive power of removing the

executive officers of the United States whom he has appointed by and with the advice and consent of the Senate." *Id.*, at 60. The Court answered this question in the affirmative.

In his analysis, the Chief Justice engaged in a lengthy and detailed examination of the powers of the President based on the legislative history, *The Federalist* and other writings of the Founding Fathers, actual practice and opinions of various Attorneys General, and case law. He also reviewed extensively the impeachment trial of President Andrew Johnson for removing executive officer contrary to the will of Congress. His analysis resulted in a thoroughly reasoned 70-page opinion. Finding little history of the discussion of the removal power in the records of the Constitutional Convention, the Chief Justice resorted to an intensive and thorough examination of a debate in the First Congress, a debate characterized as "one of the ablest constitutional debates which has taken place in congress since the adoption of the constitution." *Parsons v. United States*, 167 U.S. 324, 329 (1897). Further elaborating on what is often referred to as the "Legislative Decision of 1789," *Parsons* found:

> [The debate] lasted many days, and all arguments that could be thought of by men, many of whom had been instrumental in the preparation and adoption of the constitution were brought forward in the debate for and against that construction of the instrument

> which reposed in the President alone the power to remove from office.

Id.

James Madison occasioned this debate when he moved in the House of Representatives to create certain offices answerable to the President. Included in his motion was the statement that these officers were "removable by the President." *Myers*, 272 U.S. at 112. A discussion then ensued concerning whether to strike the clause referring to the President's removal power. *Id.* Congress retained the language, voting 34-20. *Id.* Some time later, a Member objected to the clause vesting removal power in the President because that Member believed that inclusion might be construed to imply that the removal power was derived from the legislature when, in fact, it is granted in the Constitution by Section 1 of Article II. *Id.* James Madison, on hearing this objection, agreed with the reasoning and constitutional interpretation of that Member. *Id.* at 113. The House also agreed with this interpretation, deleted the removal clause by a vote of 31-19, and referred the bill to the Senate, where the vote was 10-10; Vice President Adams provided the vote necessary to pass it. *Id.* at 114-15.

In the course of his opinion, Chief Justice Taft had occasion to review statements made by James Monroe and Alexander Hamilton, among many others. For example, "Mr. Madison insisted that Article 2, by vesting the executive power in the

President, intended to grant to him the power of appointment and removal of executive officers except as thereafter expressly provided in that article." *Id.* at 115. This strongly supports the plain language of the Constitution, and his own writings in *The Federalist*, that Section 1 of Article II vests all executive power in the President, whereas Section 2 merely places some limitations on certain powers so granted by blending very limited blended powers of Congress in that Article.

Chief Justice Taft noted that Hamilton, during his tenure as Secretary of the Treasury in Washington's cabinet, strongly believed in Monroe's interpretation.[2] *Id.* at 137. Indeed, Hamilton wrote that a complete list of executive powers were too many to grant other than in a very general, plenary grant. Hamilton's writings are sufficiently persuasive to require setting out extensively here, as did Chief Justice Taft:

> The *second article of the Constitution of the United States section first, establishes this general proposition, that "the Executive Power shall be vested in a President* of the United States of America."

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[2] Undeniably, Hamilton wrote in *The Federalist* No. 71 (Alexander Hamilton) that he believed the power to consent to appointments included the power to consent to removals; but he changed his mind.

The same article in the succeeding section proceeds to delineate particular cases of executive power. . . .

It would *not consist with the rules of sound construction, to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause*, further than as may be coupled with the express restrictions or limitations, as in regard to the co-operation of the Senate in the appointment of officers and the making of treaties, which are *plainly qualifications of the general executive powers*. . . . The *difficulty of a complete enumeration of all the cases of executive authority would naturally dictate the use of general terms*, and would render it improbable that a specification of certain particulars were assigned as a substitute for those terms, when antecedently used. . . .

The enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power, leaving the rest to flow from the general grant of that power. . . .

The general doctrine of our Constitution is that the executive power of the nation is vested in the President, subject only to the exceptions and qualifications, which are expressed in the instrument. Two of those have already been noticed, the participation of the Senate in the appointment of officers, and in the making of treaties. A third

> remains to be mentioned: the right of the Legislature to declare war and grant letters of marquee and reprisal. *With these exceptions, the executive power of the United States is completely lodged in the President.*

Id. at 137-39 (quoting 7 *The Works of Alexander Hamilton*, 80-81 (John C. Hamilton ed., 1851)) (emphasis added).

Furthermore, James Madison argued directly for Presidential control of *all* executive officers, including power of removal at will, as essential to placing responsibility in one person, who is in turn responsible to the people:

> If the President should possess alone the power of removal from office those who are employed in the execution of the law will be in their proper situation, the chain of dependence being preserved; the *lowest officers, the middle grade, and the highest will depend, as they ought, on the President, and the President on the community.*

Myers, 272 U.S. at 132 (quoting 1 *Annals of Cong.* 499 (1789)) (emphasis added).

Chief Justice Taft found that the Constitution required that "the branches should be kept separate in all cases in which they were not expressly blended" and that "the Constitution should be expounded to blend no more than it affirmatively requires." *Myers*, 272 U.S. at 116. He also held that "[t]he vesting of the executive power in the President was essentially a

grant of the power to execute the laws." *Id.* at 117. Therefore, he concluded, Section 1 of Article II is a general grant of the executive power and Section 2 merely provides some narrow limitations on that power:

> The *executive power was given in general terms, strengthened by specific terms* where emphasis was regarded as appropriate *and was limited by direct expressions where limitation was needed*, and the fact that *no express limit was placed on the power or removal* by the executive was convincing indication that none was intended.

Myers, 272 U.S. at 118 (emphasis added).

Chief Justice Taft concluded that Article II, § 2, provides the President with the power to appoint and remove executive officers:

> Our conclusion on the merits . . . is that *article 2 grants* to the President the executive power of the government, i.e., *the general administrative control of those executing the laws, including the power of appointment and removal* of executive officers. . . .
>
> * * *
>
> [T]he provisions of the second section or article 2, which blend action by the legislative branch or by part of it, in the work of the executive, are limitations *to be strictly*

> *construed, and not to be extended by implication.*

Id. at 163 (emphasis added). Thus, Taft held that the President's executive power is plenary.

B. Cases Inconsistent With The Conclusions Set Forth Above, The Plain Language Of The Constitution, And The Intent Of The Founders Should Be Overruled.

1. *United States v. Perkins* should be overruled.

Surprisingly, given its constitutional holding, *Myers* recognized that *United States v. Perkins*, 116 U.S. 483 (1886), held that Congress could condition the terms under which the President could dismiss inferior officers. It could do so if the officers were appointed without Senate consent, pursuant to the Congress's delegation of appointment to the President or department heads, under Article II, § 2. *Id.* at 127, 161-63. *Myers* should have overruled *Perkins* because it is inconsistent with the plain language of the Constitution, the political precepts upon which the Constitution is based, and the principal holding of *Myers*.

Perkins dealt with the removal by the President, through the Secretary of the Navy, of a naval cadet, contrary to a law passed by Congress. The United States argued that the law unconstitutionally infringed upon the power of the President to remove

an inferior executive officer. The Court disagreed in a one-paragraph discussion, without examination of the plain language of the Constitution, the political precepts on which the Constitution is based, legislative history, or other cases. That Court simply proclaimed by judicial fiat:

> We have no doubt that when congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The *constitutional authority in congress to thus vest the appointment implies authority to limit*, restrict, and regulate the *removal* by such laws as congress may enact in relation to the offers so appointed.

Perkins, 116 U.S. at 485 (emphasis added). *Myers*, to the contrary, specifically and correctly held that the blended powers of Congress, set out in Section 2 of Article II, must "*be strictly construed, and not to be extended by implication.*" *Myers*, 272 U.S. at 163. *Perkins* is contrary to the plain language of the Constitution, the political theory set out in *The Federalist*, the express writings of James Madison and Alexander Hamilton, and the "Legislative Decision of 1789," all approved by *Myers*. Indeed, it is contrary to *Meyer's* constitutional holdings set out above.

Nor is *Perkins* consistent with the constitutional requirement that the power of Congress be strictly construed, to check its propensity to appropriate all

power to itself. No provision in the Constitution provides Congress with any control over removal of any executive officer. The power to consent to appointments, or to designate what officers may make appointments, is irrelevant to the power of removal, a purely executory function.

Every time Congress provides any limitation on the removal of any officer performing any executive function, whether removal only for cause or a term of office, it draws executive power and prerogative into its "impetuous vortex." *The Federalist* No. 48 at 343 (James Madison) (Benjamin Fletcher Wright ed., 1961). Under the *Perkins* reasoning, all Congress need do to absorb the President's executive power is give up its right to consent to appointments and vest the appointment power in the President alone or in department heads. Surely, Congress may not so easily avoid the dictates of the Constitution, especially given the skepticism with which the Founders viewed legislative power.

The only reasonable explanation why the *Myers* Court did not overrule *Perkins* is because the issue presented in *Perkins* was not before the *Myers* Court, though it did expound on it at some length as precedent. It is now time, however, for this Court to reconsider its decision in *Perkins*, as well as the other decisions challenged here and recognize that this Court has for many years departed from the Constitution's plain language and the intent of the Founders regarding independent agencies.

2. *Humphrey's Executor v. United States* should be overruled.

Humphrey's Executor v. United States, 295 U.S. 602 (1935), is another prime example of this Court ignoring constitutional text and permitting the legislature to "draw all power into its impetuous vortex." Indeed, it is the inevitable outgrowth of *Perkins*. In *Humphrey's Executor*, the Court found, for the first time, that so-called "independent agencies" were constitutional, and the decision is the fountainhead of the judicially sanctioned expansion of those agencies since then.

Congress had created the Federal Trade Commission and empowered it to prevent persons from using unfair methods of competition in commerce. The Commission had the power to make rules (subject to the sufficient delegation from Congress), investigate and prosecute violations, and adjudicate the violations prosecuted (subject to due process standards of fairness and review by Article III courts). *Humphreys' Executor*, 295 U.S. at 620-21.

The Commission consisted of five members appointed for specified terms by the President with the advice and consent of the Senate. *Id.* at 620. The President could remove these members only for "inefficiency, neglect of duty, or malfeasance of Office." *Id.* President Roosevelt removed, without cause and during his specified term, one of the commissioners appointed by President Hoover. Thus, the issue before the Court was whether Congress

acted unconstitutionally in encroaching on the executive power of the President by limiting the removal powers of the President.

The *Humphrey's Executor* Court, without any constitutional analysis, found Congress's action constitutional. It ignored the plain language of the Constitution and the intent of the Founders, as well as the carefully reasoned constitutional analysis of *Myers*. It "gutt[ed], in six quick pages, devoid of textual or historical precedent for the novel principal set forth, a carefully researched and reasoned 70-page opinion[, *Meyers*]." *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting). In fact, *Humphrey's Executor* was "considered by many . . . the product of an activist, anti-New Deal court bent on reducing the power of President Franklin Roosevelt." *Id.* at 724.

In *Humphrey's Executor* the Court found that Congress's purpose in creating the FTC was to render it "*independent of any department of the government.*" *Humphrey's Executor*, 295 U.S. at 625 (emphasis added). In fact, Congress intended that the Commission be answerable only to the people of the United States:

> [T]he commission was *not to be "subject to anybody in the government but * * * only to the people of the United States" free from "political* domination or *control*" or the "probability or possibility of such a thing" to be "separate and apart from any existing

> department of the government – *not subject to the orders of the President.*"

Id. (emphasis added).

Humphrey's Executor held Congress's constitutionally bizarre creation constitutional by the simple expedient of declaiming that it was not part of any other branch of government, or part of more than two branches, but controlled by neither. The Court found that "the Federal Trade Commission is an *administrative body* created by Congress to *carry into effect* legislative policies embodied in the statute." *Id.* at 627 (emphasis added). Though this description appears to be the very definition of executive power, the Court nevertheless held that "such a body cannot in any proper sense be characterized as an arm or an eye of the executive." *Id.* Instead, The Court found that the FTC was a "quasi-legislative" and "quasi-judicial" body. *Id.* at 628. The Court then merely declared, without any legal analysis or reference to constitutional text or history:

> The authority *of Congress, in creating quasi-legislative or quasi-judicial agencies*, to require them to act in discharge of their duties *independently of executive control cannot be well doubted.*

Id. at 629.

Astonishingly, *Humphrey's Executor* did not even pause to examine how a congressional purpose to create a body "subject only to the people of the United States," beyond the control of the constitutionally

defined branches of government, could itself be sustained under the Constitution. Remarkably, the opinion then determined that the FTC exists as part of the legislative and judicial branches, though subject to neither, ignoring its "purely" executive functions such as investigation and prosecution.

Nor did the Court explain how its proclamation is consistent with the Court's own holding that there is a "fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others." *Humphrey's Executor*, 295 U.S. at 629. Nor could it have, for the Constitution creates only three forms of federal authority – legislative, executive and judicial – and sets out in some detail who shall exercise each. The Constitution says nothing about independent agencies. Indeed, the Court failed to explain even the constitutional basis for the existence of these "quasi" powers, which led Justice Jackson to complain two decades later:

> The mere retreat to the qualifying "quasi" is implicit with confession that all recognized classifications have broken down, and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.

Federal Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting).

Humphrey's Executor simply took the permissibility of independence for granted, ignoring the

constitutional requirement for political accountability as a fundamental element of the Constitution's structure. The sum of the constitutional reasoning of *Humphrey's Executor* is the bald proclamation that Congress's authority "cannot well be doubted." *Humphrey's Executor*, 295 U.S. at 629. Unaccountably, the cases since the 1930's have not discussed the constitutional basis for independent agencies or "quasi" powers:

> The embarrassing truth is that in the long line of cases since the 1930's, discussing the various facts of administrative government, not one makes a serious effort to justify the independent agencies in constitutional terms. There is talk of necessity, talk of chilling and talk of coercion – in short, talk of policy – but there is nothing about constitutional structure, or the vision of the Founders.

Stephen L. Carter, *The Independent Counsel Mess*, 102 Harv. L. Rev. 105, 131 (1988). Thus, under the current scheme, whenever Congress decides independence is necessary, irrespective of whether it is permitted constitutionally, it may insulate that agency from presidential control.

Finally, *Humphrey's Executor* legitimizes placing power in the hands of a group of men responsible to no one, contrary to Hamilton's exhortation that the great danger to political responsibility is when all power is not concentrated in one person, but in a

group of men, such as is the case with the FTC and with the PCAOB here:

> When power . . . is placed in the hands of so small a number of men as to admit of their views being easily combined in a common enterprise . . . it *becomes more liable to abuse, and more dangerous when abused, that if it be lodged in the hands of one man; who from the very circumstances of this being alone, will be more narrowly watched and more readily suspected*. . . .

The Federalist No. 71 at 457 (Alexander Hamilton) (Benjamin Fletcher Wright, ed., 1961).

Humphrey's Executor is the linchpin for the validity of independent agencies, including the independent counsel upheld in *Morrison v. Olson*, 487 U.S. 654 (1988), on which the District of Columbia Circuit principally relied in validating the PCAOB. The entire structure of such agencies, including the PCAOB, is much less than a house of cards; it is more akin to a house of air, without any foundation at all.

3. *Morrison v. Olson* should be overruled.

The inevitable outgrowth of *Humphrey's Executor* is *Morrison v. Olson*, *supra*. At issue there was the constitutional validity of the congressional creation of an independent counsel to investigate the executive branch and the President under the Ethics in Government Act. *Morrison*, like *Humphrey's Executor*,

did not engage in an examination of constitutional text or political theory to justify its decision upholding the legitimacy of the independent counsel. Like *Humphrey's Executor*, it also simply assumed, without discussion, that Congress may create independent agencies with "quasi" powers, independent of the President, whenever Congress deems it expedient. Predictably, *Morrison* relies principally on *Humphrey's Executor* and *Perkins*, *supra*. *Morrison*, 487 U.S. at 686-87, 690 n. 29. Under this reasoning, independent agencies are constitutional not because there is any basis in the text of the Constitution, but "because [a majority of the Supreme Court] say it is so." *Morrison*, 487 U.S. at 711 (Scalia, J., dissenting).

It is also clear from a reading of the entirety of the text of this case and *Humphrey's Executor* that the Court assumes, without any constitutional analysis, that Article II, § 1, is identical to Article I, § 1. *Morrison* effectively treats *Myers* as a historical relic of only academic interest, not precedent. Indeed, the Court specifically rejects Justice Scalia's view to the contrary. *Id.* at 690 n. 29 (relying on the much earlier case of *Perkins* for that proposition). Therefore, the Court views Sections 2 and 3 of Article II as the sole grants of power to the executive, rather than as a limitation on Section 1. And it does so without any constitutional analysis, but merely by proclamation.

The *Morrison* Court had a problem, though. The independent officer in question was a prosecutor wielding undeniably pure executory powers, as all

sides admitted. Indeed, in discussing *Humphrey's Executor*, the Court admitted that "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive' at least to some degree," recognizing that the entire basis for that decision was improper. *Id.* at 690 n. 28. Accordingly, the Court was forced to "reinterpret" the holding of *Humphrey's Executor*.

True to form, it did so without any analysis whatsoever, which analysis would have undermined its decision. Thus, "*Humphrey's Executor* [like *Myers*] is swept into the dustbin of repudiated constitutional principles." *Id.* at 725 (Scalia, J., dissenting). The Court then announced that *Humphrey's Executor* "really" stood for the proposition that the permissibility of independence tolerated by the Constitution rests on the *degree of intrusion into presidential authority by Congress*." That is, *Morrison* "replaced the clear constitutional prescription that the executive power belongs to the President alone with a 'balancing test.'" *Id.* at 711 (Scalia, J., dissenting).

Consequently, courts must now inquire into whether the authority that such an officer exercises is "not essential" to "the President's proper execution of his Article II powers." *Id.* at 691. Or they may inquire into whether the imposition on the President's power "unduly trammels on executive authority." *Id.* Likewise, courts may now inquire whether the President's need to control is "so central to the function of the executive branch as to require . . . that the [officer] be

terminable at will." *Id.* The Court also engaged in such additional amorphous balancing tests as "impermissibly burdens the President's power," *id.* at 692, "completely stripped [executive power] from the President,"[3] *id.*, "sufficiently deprives the President [of executive power]," *id.*, or "impermissibly undermines the powers of the Executive Branch," *id.* at 695.

Worse, the Court "does not even attempt to craft a *substitute* criterion – a judiciable standard. . . ." *Id.* at 711 (Scalia, J., dissenting) (emphasis in original). Indeed, divorced from the text of the Constitution, or the political theory on which the Founders based it, and without any reliable guidelines, *Morrison* provides no decisional rule at all. Thus, the principal of restraint on Congress required by separation of powers becomes no more than Congress's own uncontrolled discretion. *Morrison* is, therefore, "an open invitation for Congress to experiment." *Id.* at 726 (Scalia, J., dissenting). *Morrison* provided Congress with a Pandora's box of congressional authority, which Congress pried open with its appointment of the PCAOB, and this Court must not allow that.

This Court should overrule *Morrison* and return to the plain text of the Constitution and to the intent and political theories of the Founders. It should hold

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[3] This appears not to be even balancing. Rather, there is no imposition on presidential authority unless the Congress usurps all the President's authority.

that Congress's creation of the PCAOB unconstitutionally infringes on the executive power of the President, in violation of the Separation of Powers Doctrine, as does the SEC that appoints its members, another independent agency possessing no constitutional basis.

CONCLUSION

The plain language of the Constitution of the United States vests *all* executive power in the President of the United States as a plenary power. U.S. Const. art. II, § 1, cl. 1. Unlike Congress, the President does not have limited, enumerated powers "granted herein." Rather, the President possesses all executive power vested in Section 1, including the power to remove any executive officer or employee, except as limited in Section 2.

Section 2 of Article II is a limitation on the broad executive powers granted by Section 1, not a grant of power. Section 2 limits presidential power by providing a limited blending of Congress's power with that of the President by allowing the Senate to consent to treaties and certain appointments and permits Congress to vest appointment power without Senate consent in certain inferior executive officers in the President, Courts, or Department Heads. Those blended powers should be strictly construed and not extended by implication.

Nowhere in the Constitution is Congress, a body of enumerated powers only, vested with any power to condition the removal of persons performing, executing, implementing, or carrying out Congress's legislation. Nor can that power be implied from Congress's ability to designate certain persons to appoint inferior executive officers.

The constitutional text provides this formula in order to protect the liberty of the people by placing federal power in three departments of government – the legislative, the executive, and the judicial – independent of one another and co-equal. There are no others and all officers and employees of the government must, of necessity, be in one of these three branches. These branches are not entirely separate but are blended in very limited ways, as Section 2 of Article II demonstrates. The purpose of this blending is to allow those branches to check, balance, and moderate the others to prevent the concentration of too much power in any of those branches of government, particularly the legislative, which is the very definition of tyranny.

Because the legislative is the strongest and most ambitious of the branches of government, it requires more checks and balances, whereas the executive and the judicial branches require more protection. No blended power with the President should be implied, but, rather, it should be strictly construed. All efforts should be made not to allow the legislative branch to draw additional powers to itself or to limit in any way

the power of the executive, except as specifically provided by the Constitution.

The Constitution, the intent of the Founders, and the political theory on which they relied all require that the President be responsible for all persons executing or administering the laws and be responsible to the people for their performance. Thus, the Constitution requires political responsibility in carrying out or administering the laws of the United States. Independence of one or a group of persons who carry out the laws of the United States is anathema to the structure of the Constitution. Indeed, placing power in the hands of these few, independent of control and supervision by the President, is the very danger the Founders sought to avoid.

Therefore, there is no constitutional basis for "independent agencies" or for "quasi" powers. Nor may any employee or officer of the United States be independent of the three branches of government. Indeed, all officers and employees who execute, carry out, administer or implement the laws of the United States are subject to the control and supervision, without congressional limitation, of the President.

Thus, the PCAOB, at issue here, is an unconstitutional body without constitutionally adequate control and supervision and without real responsibility to anyone who may be answerable for its conduct. Such unbridled power is exactly what the Founders sought to limit. The PCAOB, like all independent agencies, wreaks havoc with the

Separation of Powers Doctrine, and this Court should so declare.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-861

In The
Supreme Court of the United States

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,
Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT
BOARD AND UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF NATIONAL ASSOCIATION OF STATE BOARDS OF ACCOUNTANCY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The National Association of State Boards of Accountancy (hereinafter "NASBA") is a non-profit corporation with its headquarters in Nashville, Tennessee. Its members are all of the state boards of accountancy of the fifty states, as well as the District of Columbia and the territories of Puerto Rico, Guam, the Northern Mariana Islands, and the Virgin Islands. For over a hundred years NASBA's primary mission has been to enhance the effectiveness of these state boards of accountancy. NASBA is also concerned with effective public protection through state regulation of public accounting. Some of the goals of NASBA are to preserve the public trust and confidence in the Certified Public Accountant (hereinafter "CPA") title, fostering compliance with ethical and all professional standards, and promoting the rights of boards of public accountancy to regulate licensees in all their professional activities.

Like the Public Company Accounting Oversight Board (hereinafter "PCAOB"), the state boards of accountancy are charged with protecting investors and other members of the public that rely on the financial statements and audits of private companies. *See* 15 U.S.C. § 7211(a). To this end, NASBA's member boards cooperate with the PCAOB in its inspection and

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[1] The National Association of State Boards of Accountancy files this brief with the consent of all parties. Letters granting consent have been filed with this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than amicus curiae, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

investigation of registered public accounting firms and associated CPAs. *Id.*, §§ 7214(c)(2) & (g)(1), 7215(b)(4)(B)(iii)(III). Indeed, federal laws require that the PCAOB report findings and refer appropriate cases to state boards. Thus, NASBA has a strong interest in asserting the constitutionality of the PCAOB as an essential partner in public protection.

SUMMARY OF ARGUMENT

The Court should rule in favor of Respondents because the District Court lacked subject matter jurisdiction or on the merits. The District Court should have dismissed Petitioners' claims at the outset because those claims are not yet ripe for review and their case before this Court is not justiciable due to their failure to pursue the extensive and exclusive review procedures of the Act. Therefore, this Court should not address the merits of Petitioners' claims and remand this case to the District Court with instructions to dismiss Petitioners' complaint for want of jurisdiction. Allowing Petitioners to proceed with their claims without utilizing the administrative review process could provide a precedent for similar lawsuits against state boards of accountancy. Such lawsuits could prove disruptive to the orderly progression of disciplinary cases before the state boards of accountancy.

Regardless, Petitioners' constitutional claims must necessarily fail on the merits. The Act does not violate the Appointments Clause as Petitioners contend because the PCAOB board members are inferior officers, the SEC is a "department," and the SEC commissioners are its "head." The Act also does not completely strip the President of the power to remove

PCAOB members, Petitioners' assertion to the contrary notwithstanding. As long as the President retains some removal power, there is no violation of the separation of powers doctrine. In short, the Act's limitations on the President's power to appoint and remove PCAOB board members comply with the Appointments Clause and the separation of powers doctrine.

This Court's evaluation of the constitutional issues should be tempered by judicial restraint. As matter of policy, this Court should refrain from judicially abolishing the PCAOB. Given the ongoing economic crisis, the PCAOB is vital to the protection of U.S. financial markets. The SEC and state boards might not have the resources to step in and fill the regulatory void that would be left by the judicial abolition of the PCAOB, and it could take Congress several months or longer to enact new legislation conforming to the Court's decision, thus leaving the public unprotected in the interim. Moreover, all past actions of the PCAOB might be called into question, thereby creating legal uncertainty for the subjects of those actions. Petitioners' purported concern that Congress will create a number of other similar agencies that collectively erode executive power if the Court approves the challenged provisions of the Act is unfounded since the PCAOB's structure has been tailored to its unique functions and would most likely be unsuitable in other regulatory arenas.

ARGUMENT

I. PETITIONERS' CASE AS IT NOW STANDS BEFORE THE COURT IS NOT JUSTICIABLE.

Amicus is concerned that any decision by this Court allowing Petitioners to bring suit challenging the constitutionally of the PCAOB without going through the administrative review process could provide precedent for similar suits at the state level challenging state boards of accountancy and thereby disrupt the orderly progress of disciplinary cases before the state boards of accountancy. Accordingly, amicus argues that the Act provides extensive and exclusive administrative remedies which Petitioners failed to pursue, and their failure to pursue those administrative remedies means that their constitutional claims are not yet ripe for review and their case before this Court is not justiciable.

A. The Act Incorporates Self-Regulatory Organization Review Provisions.

As stated previously, the Act provides extensive and exclusive administrative remedies of which Petitioners failed to avail themselves. For instance, section 107(c)(2) of the Act, 15 U.S.C. § 7217(c)(2), reads

> The provisions of sections 19(d)(2) and 19(e)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78s(d)(2) and (e)(1)) shall govern the review by the Commission of final disciplinary sanctions imposed by the Board . . . as fully as if the Board were a self-regulatory organization and the Commission were the appropriate

> regulatory agency for such organization for purposes of those sections.

Meanwhile, section 19(d)(2) of the Exchange Act, 15 U.S.C. § 78s(d)(2), provides

> Any [disciplinary] action with respect to which a self-regulatory organization is required . . . to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine.

In addition to disciplinary sanctions, the Act also provides a mechanism for SEC review of proposed Board rules. Section 107(b)(4) of the Act, 15 U.S.C. § 7217(b)(4), states that "[t]he provisions of paragraphs (1) through (3) of section 19(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78s(b)) shall govern the proposed rules of the Board, as fully as if the Board were a "registered securities association" for purposes of that section" while paragraph (1) of Section 19(b) of the Exchange Act, 15 U.S.C. § 78s(b)(1), reads

> Each self-regulatory organization shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization (hereinafter in this

> subsection collectively referred to as a "proposed rule change") accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, upon the filing of any proposed rule change, publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. **The Commission shall give interested persons an opportunity to submit written data, views, and arguments concerning such proposed rule change.** No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection. (emphasis added)

The SEC then has 35 days to approve by order the proposed rule change or initiate proceedings to determine whether the proposed rule change should be disapproved. 15 U.S.C. § 78s(b)(2). At the conclusion of proceedings to determine whether the proposed rule change should be disapproved, the SEC shall by order approve or disapprove the proposed rule change. *Id.*

The Act also provides mechanisms for SEC review of other Board actions in addition to rulemaking and disciplinary proceedings. Section 102(c)(2) of the Act, 15 U.S.C. § 7212(c)(2), provides "[a] written notice of disapproval of a completed application . . . for registration [as a registered public accounting firm] shall be treated as a disciplinary sanction for purposes of sections 105(d) and 107(c) (15 USCS §§ 7215(d), 7217(c))." In addition, section 104(h)(1), 15 U.S.C. § 7214(h)(1), provides for SEC review of Board inspection reports. It states in pertinent part that

> [a] registered public accounting firm may seek review by the Commission . . . if the firm . . . has provided the Board with a response . . . to the substance of particular items in a draft inspection report, and disagrees with the assessments contained in any final report prepared by the Board following such response . . . or . . . disagrees with the determination of the Board that criticisms or defects identified in an inspection report have not been addressed to the satisfaction of the Board within 12 months of the date of the inspection report.

However, any SEC decision made with respect to such a review is not reviewable under section 25 of the Exchange Act, 15 U.S.C. § 78y, and is not a "final agency action" for purposes of 5 U.S.C. § 704. 15 U.S.C. § 7214(h)(2).

Nevertheless, SEC orders made with respect to Board actions are generally subject to judicial review. 15 U.S.C. § 78y(a)(1) provides

> [a] person aggrieved by a final order of the Commission entered pursuant to [the Exchange Act] [15 USCS §§ 78a et seq.] may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

15 U.S.C. § 78y(b)(1) also provides that

> "[a] person adversely affected by a rule of the Commission promulgated pursuant to section . . . 19 of this title [citations omitted] may obtain review of this rule in the United States Court of Appeals for the circuit in which he resides or has his principal place of business or for the District of Columbia Circuit, by filing in such court, within sixty days after the promulgation of the rule, a written petition requesting that the rule be set aside."

Upon the filing of a petition pursuant to 15 U.S.C. § 78y(a)(1), the court has exclusive jurisdiction to affirm or modify and enforce or set aside the order in whole or in part. 15 U.S.C. § 78y(a)(3). Likewise, upon the filing of a petition pursuant to 15 U.S.C. § 78y(b)(1), the court has exclusive jurisdiction to affirm and enforce or to set aside the rule. 15 U.S.C. § 78y(b)(3). In short, Petitioners could have raised their constitutional claims before a United States Court of Appeals on a petition for judicial review.

B. The District Court Lacked Subject Matter Jurisdiction Over Petitioners' Constitutional Claims Due to Their Failure to Pursue Exclusive Administrative Remedies.

This Court has long recognized that the failure of a party to pursue its exclusive administrative remedies precludes a trial court from exercising subject matter

jurisdiction over that party's claims.[2] It does not matter whether the statute in question expressly provides that the statutory review procedure is the exclusive means of review. *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422 (1965). This principle has been applied to the SRO review mechanisms discussed above. For instance, in *Swirsky v. NASD*, the First Circuit said

> The Exchange Act creates a comprehensive procedure to safeguard due process in disciplinary hearings, and for administrative and judicial review of NASD disciplinary actions. We agree with other circuits that have considered the question that the "comprehensiveness of the review procedure suggests that the doctrine of exhaustion of administrative remedies should be applied to prevent circumvention of established procedures."

124 F.3d 59, 62 (1st Cir. 1997) (*quoting First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 695 (3rd Cir. 1979)) (other citations omitted). In addition, constitutional claims may also be subject to exclusive administrative

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[2] *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994) ("We conclude that the Mine Act's administrative structure was intended to preclude district court jurisdiction over petitioner's claims and that those claims can be meaningfully reviewed through that structure consistent with due process."); *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 419 (1965) ("We believe Congress intended the statutory proceedings before the Board to be the sole means by which questions as to the organization or operation of a new bank by a bank holding company may be tested ").

review procedures. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (citations omitted) (noting that petitioner's constitutionally claims could be meaningfully address in the Court of Appeals on a petition for judicial review). Moreover, it does not matter whether the constitutional claim is a facial or an as-applied challenge. *See, e.g., Nat'l Taxpayers Union v. SSA*, 376 F.3d 239, 243-244 (4th Cir. 2004).

In the present case, Petitioners brought suit directly in the United States District Court challenging the constitutionality of the PCAOB without utilizing the Act's administrative review procedures. However, the District Court allowed the suit to proceed despite Respondents' arguments to the contrary and the D.C. Circuit upheld this decision on appeal. Nevertheless, Petitioners could have had meaningful review of their constitutional claims in the Court of Appeals on a petition for judicial review and the District Court should not have exercised jurisdiction over those claims.

C. Petitioners Have Not Suffered a Cognizable Injury, and Their Claims Are Not Yet Ripe for Review.

More importantly, Petitioners' failure to pursue the exclusive administrative review procedures of the Act mean there claims are not yet ripe for review and their case before this Court is not justiciable. It is well-settled that "Article III of the Constitution limits the judicial power of the United States to the resolution of 'Cases' and 'Controversies.'" *See Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 599-598 (2007). With respect to the ripeness element of justiciability, the Supreme Court has said "the ripeness requirement

is designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998) (citation omitted). In addition, "[t]he ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of -- even repetitive -- post-implementation litigation." *Id.* at 735. This Court has generally stated the ripeness requirement as follows:

> In deciding whether an agency's decision is, or is not, ripe for judicial review, the Court . . . examine[s] both the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.' To do so . . . [the Court] must consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) *whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.*

Id. at 733 (emphasis added).

In the present case, judicial intervention would inappropriately interfere with further administrative action because the PCAOB and the SEC have not yet been given an opportunity to weigh in on these important issues. Moreover, the courts would benefit

from further factual development of the issues presented since the SEC or PCAOB may interpret or apply the challenged provisions in such a way that they are not constitutionally suspect. Regardless, *Ohio Forestry Association* suggests Petitioners' failure to utilize the administrative review process means their constitutional claims are not yet ripe for review and their case before this Court is not justiciable.

II. THE ACT DOES NOT VIOLATE THE APPOINTMENTS CLAUSE.

The structure of the PCAOB is similar to that of many state boards of accountancy and PCAOB board members are similar to members of state boards of accountancy in the sense many state boards of accountancy are agencies with quasi-judicial powers that perform functions similar to those of the PCAOB. In fact most if not all of the U.S. based accounting firms and their associated persons registered with the PCAOB are also subject to the jurisdiction of one or more state boards of accountancy.[3] Section 105(d)(1)(B) actually requires the PCAOB to report disciplinary sanctions to "any appropriate State regulatory authority or any foreign accountancy licensing board with which [the] firm or person [sanctioned] is licensed or certified." NASBA is concerned that the invalidation of the PCAOB on Appointments Clause grounds could provide analogous precedent for similar state constitutional challenges to state boards of

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[3] The Uniform Accountancy Act jointly adopted by NASBA and the American Institute of Certified Public Accountants (hereinafter "AICPA") includes engagements performed pursuant to PCAOB standards in its definition of "attest," which must be performed by licensed CPAs. Unif. Accountancy Act § 3(b)(4) (2007).

accountancy in the majority of states having comparable state constitutions mandating the separation of powers. Therefore, NASBA argues that the PCAOB does not violate the Appointments Clause for the following reasons.

A. The PCAOB Board Members Are Inferior Officers.

First, the PCAOB board members are inferior officers under this Court's Appointments Clause jurisprudence. The Appointments Clause provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in *the Heads of Departments*." U.S. Const. art. II, § 2, cl. 2 (emphasis added). The Ninth Circuit has summed up the analysis as follows:

> The proper method of appointment hinges upon the nature of the position in question. The Appointments Clause "divides all its officers into two classes." *United States v. Germaine*, 99 U.S. 508, 509 (1878). "Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by *the heads of departments*, or by the Judiciary." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976). These requirements apply to "any appointee exercising significant authority pursuant to the laws of the United States." *Id.* at 126. Individuals who are merely employees of the United States government do not implicate the Appointments Clause. *Id.* at 126 n.162.

Silver v. U.S. Postal Serv., 951 F.2d 1033, 1037 (9th Cir. 1991). In *Edmond v. United States*, 520 U.S. 651, 653 (1997), this Court defined the term "inferior officer" as follows:

> Generally speaking, the term "inferior officer" connotes a relationship with some higher ranking officer or officers below the President: whether one is an "inferior" officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase "lesser officer." Rather, in the context of a clause designed to preserve political accountability relative to important government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.

This Court also considers the following factors in determining whether an officer is "principal" or "inferior":

> We need not attempt here to decide exactly where the line falls between the two types of officers, because in our view appellant clearly falls on the "inferior officer" side of that line. Several factors lead to this conclusion ... [f]irst, appellant is subject to removal by a higher Executive Branch official . . . [s]econd, appellant is empowered by the Act to perform only certain, limited duties . . . [t]hird, appellant's

> office is limited in jurisdiction . . . [f]inally, appellant's office is limited in tenure . . . [i]n our view, these factors relating to the "ideas of tenure, duration . . . and duties" of the independent counsel . . . are sufficient to establish that appellant is an "inferior" officer in the constitutional sense.

Morrison v. Olson, 487 U.S. 654, 671-672 (1988) (citations omitted). Applying the *Morrison* factors to the Postmaster General, the Ninth Circuit in *Silver* concluded

> Inherent in the corporate model is a split between those who control the organization and those who run the business. The [Postmaster General] performs many tasks and has many responsibilities, but he does not have "control." The corporate structure "limits" the [Postmaster General]. He is a management agent, tenuously serving at the pleasure of the [Board of Governors of the U.S. Postal Service]. As a management agent, the [Postmaster General] must be considered an "inferior" officer.

Id. at 1040.[4] Other circuits have reached similar conclusions. For instance, in the case of *Pa. Dep't of Pub. Welfare v. U.S. Dep't of Health & Human Servs.*,

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[4] The Ninth Circuit also noted that "[t]o conclude that the PG is a principal agent would, in effect, prohibit Congress from ever adopting a corporate model of organization" and "[g]iven the strict control that the GOVERNORS have over the [Postmaster General], we do not believe that the Appointments Clause dictates that result." *Silver v. U.S. Postal Serv.*, 951 F.2d 1033, 1040, n.3 (9th Cir. 1991).

80 F.3d 796, 804 (3d Cir. 1996), the Third Circuit applying the *Morrison* factors held that "the [HHS] Appeals Board members are 'inferior officers' for purposes of the Appointments Clause."

Applying the *Morrison* factors to this case, it is clear that the PCAOB members are inferior officers. They are directed and supervised by the SEC whose members are appointed by the President with the advice and consent of the Senate. Section 107(d)(1) of the Act reads "[t]he [SEC] may relieve the Board of any responsibility to enforce compliance with any provision of this Act, the securities laws, the rules of the Board, or professional standards." 15 U.S.C. § 7217(d)(1). In addition, section 107(b)(2) of the Act provides that "[n]o rule of the Board shall become effective without prior approval of the [SEC]," 15 U.S.C. § 7217 (b)(2), while section 107(c)(3) of the Act empowers the SEC to "enhance, modify, cancel, reduce, or require the remission of a [PCAOB] sanction" if the SEC finds that the sanction is "not necessary or appropriate in furtherance of [the Act] or the securities laws" or "excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed," 15 U.S.C. § 7217(c)(3). Taken together these provisions make clear that the PCAOB board members cannot do anything without at least tacit approval from the SEC. Therefore, they perform limited duties and have limited jurisdiction within the meaning of *Morrison*.

Petitioners make much of the fact that the PCAOB's members can be removed only for cause. However, removal power is not dispositive to the Appointments Clause issue. In *United States v. Hilario*, 218 F.3d 19, 25 (1st Cir. 2000), the First

Circuit attempting to reconcile *Morrison* and *Edmond* held

> United States Attorneys are to be regarded as inferior officers if their work is "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate," *Edmond*, 520 U.S. at 663, and, if not, might still be considered inferior officers if the nature of their work suggests sufficient limitations of responsibility and authority, *see Morrison*, 487 U.S. at 671-72. Measured against those benchmarks, United States Attorneys are inferior officers.

More importantly, the *Hilario* court also noted

> the Attorney General does not have the authority to discharge a United States Attorney. But this fact, standing alone, does not tip the balance. Although the "power to remove officers . . . is a powerful tool for control," it is not a necessary adjunct to the exercise of control. In all events, the case law does not require "control" by a superior officer, but only direction and supervision. Given the Attorney General's broad array of supervisory powers, *the absence of the power of removal is not fatal to the government's position in this case.*

United States v. Hilario, 218 F.3d 19, 26 (1st Cir. 2000) (citations omitted) (emphasis added). *Hilario* strongly supports the proposition that removal power is not the exclusive means of control for purposes of determining whether an officer is principal or inferior. Moreover, the power of the SEC to completely strip the PCAOB

of its responsibilities under section 107(d)(1) of the Act, 15 U.S.C. § 7217(d)(1), is no less effective than removal power in ensuring control. At any rate given the SEC's extensive control over the PCAOB's members, the PCAOB are clearly inferior officers for Appointments Clause purposes.

B. The SEC Is a Department, and the SEC Commissioners Are a Department Head.

Congress may vest the appointment of inferior officers in department heads. Because the PCAOB board members are inferior officers, the question then becomes whether the SEC is a department and if so, whether the SEC commissioners are collectively its head.[5] This Court has long held that "the term 'Department' refers only to 'a part or division of the executive government, as the Department of State, or of the Treasury,' expressly 'created' and 'giv[en] . . . the name of a department' by Congress." *Freytag v. Comm'r*, 501 U.S. 868, 886 (1991) (citations omitted). In *Silver v. United States Postal Service*, 951 F.2d 1033, 1038 (9th Cir. 1991), the Ninth Circuit noted that "[w]hile the [US Supreme] Court never defined exactly what constitutes a 'department' for Appointments Clause purposes, it suggested that

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[5] *Silver v. U.S Postal Serv.*, 951 F.2d 1033, 1038 (9th Cir. 1991) ("Because we find that the Postal Service is a 'department' capable of receiving appointment authority; that, within the corporate structure adopted by Congress, the GOVERNORS are the head of the department; and that, as management agents, the [Postmaster General] and the [Deputy Postmaster General] are 'inferior' officers, we hold that the [Postal Reorganization Act of 1970] conforms with the requirements of the Appointments Clause and is therefore constitutional.").

departments are 'executive divisions like the Cabinet-level departments.'" Nevertheless, the Ninth Circuit held that "the Postal Service is a 'department' that is capable of receiving the ability to appoint inferior officers under Article II § 2 cl. 2." *Id.*

With respect to identifying the "head" of a department, the Ninth Circuit has noted that

> [w]ithin the corporate framework explicitly established by Congress, the GOVERNORS are the head of the department. Congress carefully vested ultimate control and authority of the Postal Service in the GOVERNORS. The GOVERNORS hold three key trump cards: (i) the power to appoint and remove the [Postmaster General], 39 U.S.C. § 202(c), (ii) *the unilateral power to revoke any authority delegated* by the Board, 39 U.S.C. § 402, and (iii) the authority to designate mail classifications and to set postal rates, 39 U.S.C. § 3621.

Id. at 1039.

Silver clearly supports the proposition that an independent agency such as the SEC can be a department and a collective body such as the SEC commissioners can be a department head for Appointments Clause purposes. Like the Board of Governors at issue in *Silver*, the SEC commissioners have the unilateral power to revoke any authority delegated to the PCAOB. *See* 15 U.S.C. § 7217(d)(1). They also have the power to appoint and remove PCAOB board members subject to certain limitations. Therefore, the SEC is a department and the SEC

commissioners are its head. Since the SEC is a department, the SEC commissioners are its head, and the PCAOB board members are inferior officers for purposes of the Appointments Clause, the structure of the PCAOB does not violate the Appointments Clause.

III. THE ACT DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

As mentioned previously, the structure of the PCAOB is similar to that of many state boards of accountancy and PCAOB board members are similar to members of state boards of accountancy in the sense many state boards of accountancy are agencies with quasi-judicial powers that perform functions similar to those of the PCAOB. In fact most if not all of the U.S. based accounting firms and their associated persons registered with the PCAOB are also subject to the jurisdiction of one or more state boards of accountancy. Section 105(d)(1)(B) actually requires the PCAOB to report disciplinary sanctions to "any appropriate State regulatory authority or any foreign accountancy licensing board with which [the] firm or person [sanctioned] is licensed or certified." NASBA is also concerned that the invalidation of the PCAOB on separation of powers grounds could provide precedent for similar state constitutional challenges to state boards of accountancy. Therefore, NASBA argues that the PCAOB does not violate the separation of powers doctrine for the following reasons.

Petitioners make much of the fact that the PCAOB is a "private sector, nonprofit corporation" (according to the PCAOB website) modeled on self-regulatory organizations (SROs) such as the New York Stock Exchange although the PCAOB has governmental

authority unlike SROs. They would have the Court believe that the PCAOB exercises massive unchecked executive power. However, the D.C. Circuit below noted that the grant of governmental authority is duly accompanied by government accountability because PCAOB members are appointed by the SEC. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008). Furthermore, according to the D.C. Circuit, the statute creating the PCAOB "fully preserves the Commission's authority to regulate the accounting profession, set standards, and take any action against a company or individual" since the SEC can preempt any regulatory action taken by the PCAOB. *Id.* at 680-81. Therefore, the D.C. Circuit held Congress can constitutionally limit the President's authority to remove as well as appoint PCAOB members since the SEC has effective control over the PCAOB.

It is well-settled that independent agencies such as the SEC and the Federal Trade Commission (hereinafter "FTC") are constitutional for separation of powers purposes. In *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935), this Court described the FTC as follows

> The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the

> statute, must be free from executive control. In administering the provisions of the statute in respect of 'unfair methods of competition' -- that is to say in filling in and administering the details embodied by that general standard -- the commission acts in part quasi-legislatively and in part quasi-judicially. In making investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, it acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function -- as distinguished from executive power in the constitutional sense -- it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.

Regarding the President's power to remove members of the FTC, the Court said

> [w]e think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For

> it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.

Id. at 629. In the end the Court held

> [t]he result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

Id. at 631-632.

The Court expanded upon *Humphrey's Executor* in *Morrison v. Olson*, 487 U.S. 654, 692 (1988). There the Court said

> Nor do we think that the "good cause" removal provision at issue here impermissibly burdens the President's power to control or supervise the independent counsel, as an executive official, in the execution of his or her duties under the Act. This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no

> means for the President to ensure the "faithful execution" of the laws. Rather, because the independent counsel may be terminated for "good cause," the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act. . . . We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.

Morrison, 487 U.S. at 692. In addition, the *Morrison* Court noted

> The Act thus gives the Executive a degree of control over the power to initiate an investigation by the independent counsel. In addition, the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy unless it is not "possible" to do so. Notwithstanding the fact that the counsel is to some degree "independent" and free from executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel

> to ensure that the President is able to perform his constitutionally assigned duties.

Id. at 696.[6]

These precedents make it clear that the separation of powers issue ultimately comes down to a question of control. Here the SEC can remove PCAOB board members for cause and the President can likewise remove SEC commissioners for cause. So it can hardly be said the President has been completely stripped of his removal power with respect to the PCAOB board members. However, as alluded to previously, removal is not the exclusive means of control. The SEC exercises extensive power over the PCAOB separate and apart from its removal power.

For instance, PCAOB disciplinary orders are subject to SEC review. According to 15 U.S.C.

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[6] It is well settled that

> when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.

United States v. Perkins, 116 U.S. 483, 485 (1886); *see also, Myers v. United States*, 272 U.S. 52, 161 (1926) ("Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal.").

§ 7215(d)(1)(A), the PCAOB is required to report its disciplinary sanctions to the SEC, and 15 U.S.C. § 7215(c)(2) provides,

> The provisions of sections 19(d)(2) and 19(e)(1) of the Securities Exchange Act of 1934 . . . shall govern the review by the Commission of final disciplinary sanctions imposed by the Board . . . as fully as if the Board were a self-regulatory organization and the Commission were the appropriate regulatory agency for such organization for purposes of those sections 19(d)(2) and 19(e)(1).

Section 19(d)(2) of the Exchange Act reads

> Any action with respect to which a self-regulatory organization is required . . . to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, **on its own motion**, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine.

15 USCS § 78s(d)(2) (emphasis added). In addition, application to SEC for review of a PCAOB disciplinary order or the institution of review by the SEC on its own motion operates as a stay of the order unless the SEC orders otherwise, 15 U.S.C. § 7215(e)(1), and the SEC is empowered to "enhance, modify, cancel, reduce, or require the remission of a [PCAOB] sanction" if the

SEC finds that the sanction is "not necessary or appropriate in furtherance of [the Sarbanes-Oxley Act] or the securities laws" or "excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed," 15 U.S.C. § 7217(c)(3). Furthermore, the SEC's decision on review is itself subject to further judicial review in a US Court of Appeals. 15 U.S.C. § 78y(a)(1).

Other provisions of the Act also provide for extensive SEC control over the PCAOB. For example, section 107(b)(2) of the Act, 15 U.S.C. § 7217(b)(2), reads "[n]o rule of the Board shall become effective without prior approval of the [SEC]." In addition, section 107(d)(1) of the Act, 15 U.S.C. § 7217(d)(1), provides that "[t]he [SEC] . . . may relieve the Board of any responsibility to enforce compliance with any provision of this Act, the securities laws, the rules of the Board, or professional standards." Taken together these provisions make it clear that the PCAOB cannot do anything without at least tacit approval from the SEC. They belie Petitioners' assertion that the PCAOB exercises extensive unchecked executive power. In short, the structure of the PCAOB does not violate separation of powers principles since the SEC has control over the PCAOB and the President has control over the SEC.

IV. THE COURT SHOULD REFRAIN FROM JUDICIALLY ABOLISHING THE PCAOB.

Amicus asserts that the Sarbanes-Oxley Act provisions regarding the PCAOB are entirely constitutional. However, if the court does find any of these provisions to be unconstitutional, it is imperative that the PCAOB nevertheless be permitted to continue

to function. To that end, others have advocated for the severability of any provisions of the Sarbanes-Oxley Act that may be found unconstitutional. *See* Brief Amici Curiae Counsel of Institutional Investors *et al.* p. 32. NASBA concurs; the following section details why the PCAOB's continued functioning is critical to the regulation of accountancy on the state and federal level.

The PCAOB is vital to the protection of U.S. financial markets, and its abolishment would leave a serious regulatory void. In its absence, the responsibility for regulating the accounting industry would fall largely to the SEC and state boards of accountancy. The SEC does not have the resources or the mandate to fill that void. Thus, much of the oversight of accounting firms would fall to state boards of accountancy, which are empowered to sanction CPAs for unethical conduct and incompetent work. However, state boards in turn rely on the PCAOB to play a crucial role in their investigation and discipline of CPAs. Under the Sarbanes-Oxley Act, the PCAOB is required to inspect registered public accounting firms and submit the findings of these investigations to the appropriate state board, including a report on any possible Sarbanes-Oxley Act violations. 15 U.S.C. §7214 (c)(2); 15 U.S.C. § 7214 (g)(1). Further, the PCAOB may refer ongoing investigations to state boards. 15 U.S.C. §7215 (b)(4)(B)(iii)(III). To date, PCAOB violations have been the basis for state accountancy board discipline in at least a half dozen cases.[7] Abolishing the PCAOB would hamper state

[7] *See, e.g., In re Fazio*, PCAOB Release No. 105-2007-006 (Dec. 10, 2007); *see also In re Nardi*, PCAOB Release No. 105-2007-008

boards of accountancy in their efforts to regulate the practice of accountancy and protect the public.

The PCAOB is also important to state boards' regulatory efforts because its decisions and standards have been incorporated into state statutes and rules on the practice of accountancy. At least 15 U.S. states and one territory have adopted statutes expressly referencing PCAOB auditing standards in their respective definitions of "professional standards."[8] Most others have adopted PCAOB auditing standards into their rules.[9] States have also adopted rules making PCAOB disciplinary orders prima facie evidence of violations of state accountancy laws. *See, e.g.*, 21 N.C. Admin. Code 8N.0204. Lastly, all states have also provided by statute or rule that the failure to comply with any such applicable standards may subject licensees to disciplinary proceedings.

The PCAOB's standards are also incorporated in the Uniform Accountancy Act (hereinafter "UAA"), which was jointly adopted by NASBA and the AICPA. The UAA authorizes state boards to cooperate with the

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(Dec. 14, 2007) and *In re Kantor, Geisler & Oppenheimer, P.A., et al.*, PCAOB Release No. 105-2007-009 (Dec. 14, 2007).

[8] These include: Alabama, Arkansas, Connecticut, Guam, Kansas, Louisiana, Mississippi, Missouri, Montana, New Hampshire, New Jersey, Pennsylvania, South Carolina, South Dakota, Utah, and Vermont.

[9] Adopting states include: Alabama, Alaska, Arkansas, Colorado, Florida, Hawaii, Idaho, Iowa, Kansas, Louisiana, Michigan, Minnesota, Montana, New Jersey, North Carolina, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, Washington, and Wyoming.

PCAOB and other appropriate authorities to investigate violations of the UAA and comparable acts of other states. Unif. Accountancy Act § 4(g)(1) (2007). Further, the UAA identifies the "[r]evocation or suspension of the right to practice ... by the PCAOB" as a ground for state board disciplinary action. Unif. Accountancy Act §10(a)(4) (2007); *see also, e.g.*, Unif. Accountancy Act §§ 3 (b)(4), 12(k), 18 (2007) (also citing the wording of PCAOB standards or otherwise involving the PCAOB in state disciplinary actions).

The PCAOB's critical role in regulating the practice of accountancy is also illustrated by the circumstances surrounding its creation. Prior to the enactment of the Sarbanes-Oxley Act in 2002, the now-defunct Public Oversight Board (hereinafter "POB") was charged with regulating the accountancy profession, along with the SEC and state boards of accountancy. However, the POB was created by and funded by a private trade association of accountants, the AICPA. [About the POB, http://www.publicoversightboard.org/about.htm.] The POB's disciplinary processes were "slow and ineffective" and suffering from "a number of limitations." U.S. Gen. Accounting Office, No. GAO-02-742R, The Accounting Profession: Status of Panel on Audit Effectiveness Recommendations to Enhance the Self-Regulatory System at 22 (May 3, 2002); *see also id.* The PCAOB improved upon the POB in a number of ways. Another of the positive aspects of the PCAOB's current structure is its disentanglement from the profession it regulates. Further, while the PCAOB is accountable to the SEC, its unique funding structure reduces direct congressional influence. Similarly, many state boards enjoy comparable autonomy to the extent that some are exempt from

state budget or personnel acts and members can only be removed for cause.

In short, the PCAOB, like state boards, is an integral component of accountancy regulation in the United States. It plays a vital role in regulating accounting firms and accountants who audit publicly traded companies. Any decision by this Court to judicially abolish the PCAOB would leave this segment of the accounting profession largely unregulated. Therefore, amicus respectfully asks this Court to sever any provisions of the Act it may hold are unconstitutional in lieu of declaring the Act unconstitutional in its entirety.

CONCLUSION

Since Petitioners' constitutional claims are not yet ripe for review and their case before this Court is not justiciable, amicus respectfully requests that the Court remand this case with instructions to dismiss Petitioners' complaint for want of jurisdiction due to Petitioners' failure to pursue exclusive administrative remedies. Similar lawsuits challenging the constitutionality of state boards of accountancy have the potential to disrupt the orderly progression of disciplinary cases. Alternatively, the Court should hold that the PCAOB and the Act creating it are constitutional under the Appointments Clause and separation of powers doctrine and affirm the Court of Appeals ruling which affirmed the District Court order granting summary judgment to Respondents. If the Court, however, holds that the challenged provisions are unconstitutional, amicus respectfully asks that this Court sever the challenged provisions and not judicially abolish the PCAOB.

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